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T H E
D U T Y and A U T H O R I T Y
O F
J u s t i c e s o f t h e P e a c e
a n d P a r i s h - O f f i c e r s

F O R
I R E L A N D :

C O N T A I N I N G

The S T A T U T E S which give Jurisdiction to such M A G I S T R A T E S ;
and A U T H O R I T I E S from the best and latest R E P O R T S ,
relative to the Exercise of their Office.

W I T H A

Great Variety of P R E C E D E N T S formed upon the Words of the A c t s
of Parliament. An A L P H A B E T I C A L T A B L E of the Titles, and a
C H R O N O L O G I C A L T A B L E of the S T A T U T E S, directing to the
Heads under which they are placed.

Also an I N T R O D U C T I O N , shewing

- I. *Certain abbreviations made use of in this work.*
- II. *Some general rules to be observed, in the construction of acts of parliament.*

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in the Ecclesiastical and Civil Courts.

D U B L I N :

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T H E

P R E F A C E.

OUR constitution is, in no instance, more to be admired for it's excellence, than in the provisions made for the execution of the laws. The king, as the supreme magistrate, is the fountain of all judiciary authority; this is delegated by his commissions to his judges, justices, and other magistrates, for the protection of the subjects in their rights and properties.

As offences against the laws must frequently happen, in places too remote from the superior courts, to be immediately redressed there; and in cases, which require the immediate interposition of the magistrate's authority, a jurisdiction is provided, by which a speedy redress may be obtained for injuries done or threatened, in breach of the peace, whereby offenders are restrained and bound to abide the sentence of the law for their transgressions.

A great judge has declared, " That the institution
 " of justices of the peace is such a form of subordi-
 " nate government, for the tranquillity and quiet of
 " the realm, as no other part of the Christian world
 " hath the like, if the same be duly executed."

P R E F A C E.

Some idea of the extent of their jurisdiction may be formed, from the general clause of their commission, whereby the justices are commanded, to cause to be kept all the ordinances and statutes, made for the good of the peace, and for the quiet rule and government of the people, in all and singular their articles, according to the force, form, and effect of the same; and to chastise and punish all persons, that shall offend against the form of those ordinances, or any of them.

By the statutes, a variety of offences are cognizable before justices of the peace, and several matters are determinable by them, according to their discretion; but this must be guided by the rules of reason, law, and justice, and not by arbitrary opinion. So that a competent knowledge, not only, of the laws themselves, but also, of the due manner of executing them, will be found to be requisite, to enable the gentlemen, honoured with this office, to discharge the great trust reposed in them, with advantage to the publick, and credit to themselves.

Ignorance of their duty, in magistrates, may be attended with very injurious consequences to the subject, and may often prove disgraceful and prejudicial to themselves: informations and complaints may be brought against them before superior courts, for a refusal to do their duty, or a transgression of the bounds of it; penalties are, by several statutes, to be inflicted on them for neglects of it, and actions may be brought against them, if they exceed the limits of their authority, to the oppression or vexation of their fellow subjects. But the magistrate, who is conscious that he knows his duty, acts with a resolution, becoming

coming the dignity of his office, and absolutely necessary to the due discharge of it.

There have been above fifty new species of treason and felony created by statutes, since the revolution: difficulty in acquiring a competent knowledge of our statute laws, is the necessary consequence of the multiplicity and frequent alterations of them. Numerous penal laws, subjecting the offenders, in many instances, even to capital punishment, may become subversive of the security, which is essential to the liberty of a free people, unless the laws are sufficiently known and attended to by the magistrate, to whom the execution of them is committed.

The late tumults in several parts of this kingdom, having induced both Houses of Parliament to resolve, “ That it is the duty of all magistrates of corporations, justices of the peace, and sheriffs of every part of this kingdom, to be particularly active in executing the laws, as well those for the protection of private property, as for the suppression and punishment of offenders;” and it being declared by that honourable House, “ That such violent and tumultuary proceedings (for redressing pretended, or even real grievances) undoubtedly are treason against the State:” Care has been taken to lay before the magistrates, the nature of such offences as have been resolved to be treason by the construction of *Stat. 25 Edw. 3. cap. 5.*

Though the trial of treason or felony does not belong to justices of the peace, but is expressly reserved and excepted in their commission, yet it is necessary they should be informed particularly, what offences are to be considered as such, in order to bring the persons

sons accused of such crimes to trial, and (if need be) to punishment; and that they may not be bailed or suffered to escape, contrary to the intention of the laws.

There have been many treatises, published in *England*, for the direction and assistance of justices; Sir *Richard Bolton* is the only person (worthy of notice) who has performed any thing of this nature for *Ireland*: Mr. *Travers* having only published a new edition of *Bolton's* work, with the addition of such modern statutes relative to the subject, as occurred to him; and Sir *Richard Bolton* compiled his treatise, almost *verbatim*, from Mr. *Dalton's* work, without other alterations, than transposing some of the chapters, and inserting the *Irish* statutes, instead of the *English* acts, relative to the same matter, and omitting such as did not extend to or bind this kingdom.

Several treatises on the crown-law, and many reports of great authority having been published since Sir *Richard Bolton's* time, it is to be presumed that materials of great value may be extracted from them for the improvement of what has been hitherto attempted in this kingdom, upon this subject.

A work, has been lately published in *England*, intitled, *The justice of peace and parish officer*, by Dr. *Burn*, which seems to have been received with a very general approbation, as eight editions of it have passed the press in the same number of years; and is said to be upon a plan entirely new, and comprehending the whole law, relative to the subject, brought down to the present time.

“ The author proposeth in this book to render the
 “ laws relating to the subjects it treats of, a little more
 “ intelligible, than hath hitherto been done; and
 “ hath

“ hath attempted to bring together, under one general
“ title, divers articles relating to the same subject,
“ which, in the common books, are broken and de-
“ tached, under various separate titles; hoping, there-
“ by, that what hath hitherto been thought intro-
“ ductory of confusion, may tend to render the sub-
“ ject more perspicuous, in exhibiting the whole un-
“ der one comprehensive view.

“ In these large comprehensive titles, care is like-
“ wise taken, to be as particular as may be, without
“ injuring the connexion in the statutes, by inserting
“ the whole law by itself, relating to each separate
“ article.

“ And by this method of bringing together, into
“ one general title, all those separate distinct titles,
“ which have a mutual relation to and dependance
“ upon each other, the author hath avoided one
“ great inconvenience, of referring the reader from
“ one title to another, and from that other, back
“ again to the first, and (which is not unusual in
“ books of the like kind) perhaps losing the thing to
“ be treated of betwixt them.

“ Upon which account also, where one law occur-
“ reth under two different titles, it is usual with him
“ to insert the same under both those titles; that so
“ the reader's attention may not be interrupted, by
“ sending him to search other titles, and from those,
“ perhaps, others again, which have no principal re-
“ lation to the matter he hath in hand.

“ Also, upon another account, he hath sometimes
“ made use of more words than otherwise he would
“ have done, namely, to avoid the frequent repeti-
“ tion of the term, &c. which is a vague expression,
“ and apt to create an uneasiness in the reader's mind,
“ for

“ for that he cannot be satisfied from thence, how
 “ much, or how little is intended to be understood.

“ He hath also been somewhat large in the
 “ matter of *precedents* under divers titles; and hath
 “ endeavoured to bring them much nearer to the sta-
 “ tutes, upon which they ought to be formed, than
 “ usually hath been done.

“ The materials which the author hath made use
 “ of, are chiefly of four kinds,———The *statutes*
 “ at large———the several treatises concerning
 “ the *pleas of the crown*———the *reports* of cases
 “ adjudged in the court of king’s bench———
 “ and the books concerning the *office of a justice of the*
 “ *peace*.

“ As to the *statutes* at large, or acts of parliament;
 “ the author hath by no means thought himself at
 “ liberty, as Mr. *Dalton* and others have done, to de-
 “ liver the import thereof in his own words; but
 “ hath constantly abridged the act, in the words of
 “ the act itself, leaving out as little as possible, which
 “ may seem any way material. And to each distinct
 “ clause, he hath annexed the interpretation there-
 “ of, where the same hath been determined in the
 “ court of king’s bench, or expounded by other good
 “ authority.

“ The treatises concerning the *pleas of the crown*,
 “ are those of *Stamford*, *Coke*, *Hale*, and *Hawkins*.
 “ Of the first of these, the author hath made little
 “ use, further than as he is adopted by the other
 “ three. As to which three great authorities, where
 “ the law hath been declared by Lord *Coke*, and not
 “ controverted by any other, nor altered since his
 “ time by any act of parliament, or judicial deter-
 “ mination, the author hath given to him the pre-
 “ ference.

“ference. And where any of these differeth from
“the other, he hath noted the difference.

“In citing of Mr. *Hawkins*, he hath not thought
“it allowable, as is usual with others, to omit the
“several degrees of caution and assent, with which
“he delivereth his opinion; as, *it seemeth*, or, *it hath*
“*been said by some*, or, *it seemeth to be the better opi-*
“*nion*, or, *it seemeth to be agreed*, and the like; which
“are by no means arbitrary without much meaning,
“but are inserted by him with the utmost deliber-
“ation and judgment.

“As to the books of *reports*; where the cases
“therein have been considered by Mr. *Hawkins*, and
“the other learned persons before-mentioned, the
“author hath judged it very proper to leave the
“matter there as settled by them. As to the rest,
“he hath by no means thought himself of ability
“to proceed in Mr. *Hawkins*’s manner, by laying to-
“gether all the reports on the same subject, and
“thereupon extracting an opinion out of the whole;
“but hath inserted the same at large, or what he
“hath thought most material thereof.

“The books of authority concerning the *office of*
“*a justice of the peace*, are those of *Fitzherbert*, *Crompton*,
“*Lambard*, and *Dalton*; the last of which was
“published in the reign of King *James* the First,
“since which time, no book under that title hath
“been allowed as sufficiently authentick. And *Dal-*
“*ton* himself is much injured in the modern editi-
“ons, in like manner as was observed before of Mr.
“*Hawkins* by delivering that as absolute, which Mr.
“*Dalton* published under the several degrees of as-
“sent or doubtfulness before-mentioned; and which
“the author, in justice to Mr. *Dalton*, hath restored.

X P R E F A C E.

“ Where *Dalton* hath adopted *Lambard*, *Crompton*,
“ and *Fitzherbert* (which he doth most frequently in
“ their own words) the author hath thought it suffi-
“ cient to cite *Dalton*’s single authority. And gene-
“ rally, in all other cases, where authors are agreed,
“ he hath judged it unnecessary to alledge more than
“ one or two good vouchers.”

So much of Doctor *Burn*’s work, as could be adap-
ted to the present undertaking, is made use of, and
the laws of this kingdom are inserted in their proper
places, instead of the *British* statutes: several prece-
dents are taken from another work, lately published
in *England*, by Mr. *Cunningham*, and many others fram-
ed upon the *Irish* statutes.

INTRODUCTION,

INTRODUCTION,

Consisting of Two PARTS;

C O N T A I N I N G,

I. *Certain abbreviations made use of in this work.*

II. *Some general rules to be observed, in the construction of statutes, or acts of parliaments.*

I. *Certain abbreviations made use of in this work.*

IN order to keep the book within a reasonable compass, the following *abbreviations* are made use of.

1. The word *justice* is always to be understood to mean *justice* Justice. *of the peace*, when not otherwise expressed.

2. The words *one justice* shall always be understood to signify One justice. *one or more justices*: so that what is directed to be done by one, shall not be intended thereby to exclude others from joining with him.

3. In like manner, *two justices*, when not otherwise expressed, Two justices shall be understood to signify *two justices or more*.

4. So also a conviction on the oath of *one witness*, shall be un- One witness. derstood to denote *one witness or more*.

5. And *two witnesses* shall denote *two or more witnesses*. Two witness-
es.

6. (1 2.) Shall be understood to signify *one whereof is of the* Quorum. Quorum.

- Majority. 7. The *justices in sessions* shall signify the said justices, or *the major part of them*.
- Sessions. 8. The word *sessions* shall denote *the general or quarter sessions*, if not otherwise expressed.
- Warrant. 9. The word *warrant* shall always signify *warrant under hand and seal*, where not expressed otherwise.
- Judge of assize. 10. Judges or justices of *assize* shall be understood to signify also those of *Nisi Prius, Oyer and Terminer and General Gaol Delivery*.
- Mayor. 11. The word *mayor* shall always be understood to imply *bailiffs and other chief officers in corporations*.
- Poor. 12. Where a penalty, or part thereof, is expressed to be given to the *poor*; that shall be always understood to denote *the poor of the parish where the offence was committed*, if not otherwise limited.
- Penalty. 13. Where a penalty is to be recovered before the justices of the peace, it is thought indispensable to insert particularly the manner of recovering the same;
14. But where it is to be sued for in any of his majesty's courts of record at *Dublin*, it is judged not necessary to set forth the special method of procedure there:
15. And generally, where it is expressed, that a person shall do, or not do such a thing, on pain of such a sum, without more, it shall be understood that such penalty is not recoverable before the justices of the peace, but only in the courts at *Dublin*.
- Overplus. 16. In all cases of *distress and sale*, it shall be understood, that the *overplus* must be returned to the owner; after the sum or sums to be thereout deducted, shall be satisfied and paid.
- Lands. 17. *Lands* shall be understood to stand for *lands, tenements, and hereditaments*.
- Transportation. 18. Where *transportation* is directed for any offence, it shall always be understood, *that if the offender shall return before the time limited, he shall be guilty of felony without benefit of clergy*.
- Blank spaces. 19. In the blank spaces for the names in the precedents, instead of inserting initial letters arbitrarily, it is thought it may be some small help to the memory that *A. O.* shall signify the offender, *A. I.* the informer, *A. W.* the witness *J. P.* the justice of the peace, and the like.

20. Also, for brevity's sake, sums of money and other numbers are usually expressed by figures, and not in words at length; but it is to be remembered, that in the forms of warrants, convictions, and other proceedings before the justices, they ought to be expressed in words at length, and not in figures.

21. Where a statute is said to be in force, until such a day, month, and year, &c. it shall always be understood to imply, *and from thence to the end of the then next session of parliament.*

22. Abbreviations in the names of books cited as authorities, or otherwise occasionally noted, consisting for the most part of some of the initial letters of the authors names, and other common distinctions, need not to be further explained.

So also the names of the terms in which the several cases were adjudged, to wit, Hilary, Easter, Trinity, and Michaelmas, are expressed by the initial letters *H, E, T, and M.*

II. *Some general rules to be observed, in the construction of statutes, or acts of parliament.*

To avoid repeating the same observations some hundreds of times, it is thought proper to premise the following general rules to be observed, in the construction of statutes or acts of parliament.

1. Regularly, a statute in the affirmative doth not repeal a precedent affirmative statute. *11 Co. 61.*

But if the latter is contrary to the former, it amounteth to a repeal of the former. *L. Raym. 160.*

2. A statute made in the affirmative, without any negative expressed or implied, doth not take away the common law; and therefore the party may waive his benefit by such statute, and take his remedy by the common law. *2 Inst. 200.*

3. By repealing of a repealing statute, the first statute is revived. *Read. Parl.*

4. Regularly, where an act of parliament giveth a power or interest to one person certain, by this express designation of one, all others are excluded. *11 Co. 59, 64.*

5. In

Power to administer an oath.

5. In all cases, where justices may take examinations, or other accusation or proof, tho' the statute doth not expressly set down that it shall be upon oath, yet it shall be intended that it shall upon oath. *Dalt. c. 115.*

In what case the sessions may execute the power given to two justices.

6. Generally, it is holden, that where a statute appoints a thing to be done by one or more justices, without giving any appeal to the sessions; there the justices in sessions may do that thing: but where an appeal is given to the sessions, the justices in sessions cannot proceed originally therein, because that method would take away the power of appealing.

How far an indictment will lie where another method of prosecution is appointed.

7. Where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, without mentioning an indictment; it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment: Yet it hath been adjudged, that if such a statute give a recovery by action of debt, bill, plaint, information, or otherwise, it authorizes a proceeding by way of indictment. *2 Haw. 211.*

8. But every contempt of a statute is indictable, where no other punishment is limited. *1 Haw. 60.*

Where the defendant may be prosecuted both by the king, and the party grieved. In what time prosecutions shall be on penal statutes.

9. And wheresoever an act of parliament doth generally prohibit any thing, the party grieved shall not only have his action for his private relief, but the offender shall be punished at the king's suit, for the contempt of the law. *2 Inst. 163.*

10. All actions, indictments, or informations, on penal statutes, for any forfeiture limited to the king, shall be brought within two years after the offence committed; if limited to the king and prosecutor, then within one year; and if it is not sued for in that one year, then the king may sue for the same within two years, after the expiration of that one year; *2 G. 1. c. 20.* unless where it is otherwise directed by subsequent statutes.

Statutes not in the name of the whole legislature.

11. Many antient statutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning the concurrence of either lords or commons; yet inasmuch as they have always been acquiesced in as unquestionably authentic, this establishes and confirms their authority, and the defect is salved by such universal reception. *Hawkin's preface to the statutes.*

INTRODUCTION.

XV

12. The preamble or rehearsal of a statute is deemed true; Preamble. and therefore good arguments may be drawn from the preamble. 1 *Inst.* 11. But the preamble shall not restrain the operation of the enacting part; as where the preamble reciteth only a particular inconvenience, this shall not hinder a subsequent enacting clause from being understood in that more general sense which the words would otherwise and of themselves import, so as to take in other inconveniencies of the like kind, altho' not specified in the preamble. 8 *Mod.* 144. 1 *P. Will.* 320.

13. Where a statute directs the doing of a thing, for the sake of justice, or the publick good; the word *may* is the same as the word *shall*: for they are compellable so to do. 2 *Salk.* 609. May do such a thing, how to be understood.

14. Where a statute directs a penalty to be recovered *in any court of record*; this shall not be intended of the quarter-sessions, unless it be specially named in such statute; but only of the courts of record at *Dublin*. 6 *Co.* 19, 20. 2 *Hale's Hist.* 29, 30. Court of record.

15. It is a general rule in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words; as where a statute speaks of indictments to be taken before justices of the peace, or *others having power to take indictments*, it shall be understood only of other inferior courts, and not of the king's bench, or other courts at *Dublin*. 2 *Co.* 46. 2 *Haw.* 305. Higher courts not intended, where the inferior are first mentioned.

16. Where a statute gives power to the justices, to require any person to do a thing, as to take the oaths, the law implicitly gives them power to make a warrant to have the body before them; for when the law granteth any thing to any one, that also is granted, without which the thing itself cannot be: And it is against the office of the justices, and the authority given them by the law, that they shall go and seek the parties. 12 *Co.* 130, 131. Power to convene the parties.

17. Where a statute gives power to the justices of the peace, to hear and determine an offence in a summary way; it is necessarily implied, and supposed, as a part of natural justice, that the party be first cited, and have opportunity to be heard and answer for himself. 1 *Haw.* 154. Necessity of summoning the party.

18. Where an act of parliament gives power to two justices finally to hear and determine an offence, it is necessarily supposed, that they shall be both together, or, which is the same thing in other Two justices to be both together.

other words, that they shall hold a special sessions for that purpose. And the like is, when they are to do any other judicial act. For it is unknown to the laws of *England*, that two persons shall act as judges in the same cause, when at the same time one of them is in one part of the county, and the other in another.

Informer's
oath.

19. Where a statute appoints a conviction to be on the *oath of one witness*; this ought not to be by the single oath of the informer; for if the same person should be allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury, for the sake of the reward. *L. Raym.* 1545.

Confession.

20. Where a statute directeth, that a person shall be convicted of an offence, upon the *oath of one or more witnesses*, and faith nothing of the *confession* of the party; yet if the offender shall before the justice confess the offence, he may be convicted upon such confession: for confession is stronger evidence than the oath of witnesses. *Dalt.* 109, 162. *Str.* 546.

Discretionary
power.

21. Where an act of parliament gives power to the justices of the peace, to take order in any matter, *according to their discretions*; this shall be understood, according to the rules of reason, law, and justice, and not by private opinion. *5 Co.* 100.

Twelve
months.

22. It may be laid down as an invariable rule, that *the law favours liberty*: So that in the construction of a penal statute, where the interpretation is dubious, that sense must be pursued (all other things being equal) which is more beneficial to the subject, or the party suffering. Thus, where an act directs, that the justices shall commit an offender to prison for *12 months*, the justices may not alter the words, and commit him for *a year*; for in this respect, 12 months and one year are not the same; but the months must be computed at 28 days to the month, and not as kalendar months, unless it be so expressed in the act.

Forfeiture.

23. To say that a person shall *forfeit* generally, or that he shall *forfeit to the king*, is all one; for the king shall have every forfeiture not otherwise limited. *11 Co.* 60.

Except where a forfeiture is given *in lieu of property and interest*; for there it shall go to the party injured. *1 Roll's Rep.* 90.

For whosoever a statute giveth a forfeiture or penalty, against him which wrongfully detaineth or dispossesseth another of his duty or interest; in that case, he that hath the wrong shall have the

the forfeiture or penalty, and shall have an action for the same upon the statute at the common law, and the king shall not have the forfeiture in that case. 1 *Inst.* 159.

24. Where a statute saith, that such a person shall pay *fine and ransom* to the king; in legal understanding, such fine and ransom are all one: for if they were divers, then should the party pay two sums, one for the fine, and another for the ransom; which was never done. 1 *Inst.* 127.

Fine and ransom.

25. Acts of parliament that speak of fines or ransoms *at the king's pleasure*, are always to be understood of the king in his courts by his justices. 1 *H. H.* 375.

At the king's pleasure.

26. It is said, that whosoever a justice of the peace is empowered, by any statute, to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing; the justice may commit him to the gaol, to remain there till he shall comply.

Where a power of commitment is implied.

2 *Haw.* 116.

27. When a statute appoints imprisonment, but limits no time when; it shall be immediately. 8 *Co.* 119.

Imprisonment, when.

28. When a statute appoints imprisonment, but limits no time how long; the prisoner in such case must remain at the discretion of the court. *Dalt.* 410.

Imprisonment, how long.

29. Wherever a statute makes any offence *felony*; it incidentally gives it all the properties of felony at common law.

Statute making an offence felony.

1 *Haw.* 105.

30. Therefore an act of parliament that makes an offence felony, doth consequently introduce the punishment of concealing, that is, misprision of felony; and every offence made felony by act of parliament, includeth misprision. 1 *H. H.* 708.

Misprision.

31. An act making a new felony, extendeth not to infants under 14 years of age; but if they be of that age it binds them.

Infants.

1 *H. H.* 706.

32. Not only those crimes which are made felonies by the express words of any statute, but also those which are decreed to have or undergo *judgment of life and member*, do become felonies thereby, whether the word felony were mentioned or not.

Life and member.

1 *Haw.* 107.

33. But an offence shall never be made felony, by the construction of any doubtful and ambiguous words of a statute; and therefore if it be only prohibited under pain of *forfeiting body and goods*, or of being *at the king's will for body, lands, and goods*, it

Body and goods.

shall

shall amount unto no more than a high misdemeanor, punishable by imprisonment or the like. 1 *Haw.* 107.

Benefit of
clergy.

34. All felonies by the common law have the benefit of clergy; therefore where a statute enacts a felony, and says, the offender shall *suffer death*, clergy lies notwithstanding, and is never ousted without express words. 3 *Inst.* 73. 2 *Haw.* 342.

Forfeiture of
dower.

35. Saving of *dower* in a statute making an offence felony, is superfluous; for by the 1 *Ed.* 6. c. 12. Dower is not lost by the felony of the husband. *f.* 17.

Costs.

36. Where a penalty is given to an informer upon a penal statute; he shall have no *costs*, unless the statute itself directs it, but he shall pay his costs out of the penalty. 2 *Haw.* 274.

Therefore where a justice hath power to inflict a pecuniary penalty, not exceeding such a sum; he may do well in such penalty to consider the costs of prosecution.

Damages.

37. No *damages* can be given to the party grieved, upon an indictment, or any other criminal prosecution; and where by statute damages are given to the party grieved, it seems that they cannot be recovered on an indictment at the suit of the king, grounded on such statute, unless such method of recovering them be expressly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved. But it is every day's practice in the court of king's bench, to induce defendants to make satisfaction to prosecutors, for the costs of the prosecution, and also for the damages sustained, by intimating an inclination on that account to mitigate the fine due to the king. 2 *Haw.* 210.

Treble da-
mages.

38. Where a statute gives *treble damages*; the justices are not to assess the damages, and then treble them; but the jury ought to find the damages, and then the justices are to treble them. *Cro. Car.* 449.

Second of-
fence.

39. An act inflicting a penalty for a *second offence*, must always be understood, after conviction and judgment for the first offence; and the second offence must be committed after the first conviction, and judgment thereupon given; for it doth not appear to be an offence, until judgment by proceeding of law be given against the offender. 2 *Inst.* 468.

And the indictment for a second offence, must recite the record of the first conviction; and upon the evidence, the record of the first conviction must be proved: but the matter of the first conviction shall never be re-examined, but must stand for granted.

A N

ALPHABETICAL TABLE

OF THE

GENERAL HEADS OR TITLES.

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George III.

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 3 G. 3. c. 21. alehouses, excise, gaol, house of correction
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 3 G. 3. c. 29. burning land
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THE END.

Accessory.

- I. Of accessories in general.
- II. Of accessories before the fact.
- III. Of accessories after the fact.
- IV. How they are to be proceeded against.

I. Of accessories in general.

ACCESSARY (*quasi accedens ad culpam*) is he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt. Accessory, what.

2 In the highest capital offence, namely, high treason, there are no accessories, neither before nor after; for the consenters, aiders, abettors, and knowing receivers and comforters of traytors, are all principals. In the highest offence, no accessories. 1 *Hale's Hist.* 613.

But yet as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd. 1 *H. H.* 613.

3. In cases that are criminal, but not capital, as in *petit larceny* and *trespass*, there are no accessories; for the accessories before are in the same degree as principals; and accessories after, by receiving the offenders, cannot be in law under any penalties as accessories, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. 1 *H. H.* 613. In the lowest offences, no accessories.

4. It remains therefore, that the business of this title of accessories refers only to felonies, whether by the common law, or by act of parliament. Accessories only in felony. 1 *H. H.* 613.

5. Concerning which, Lord Coke observes generally, that when any offence is felony, either by the common law, or by statute, all accessories both before and after are incidentally included. 3 *Inst.* 59. Accessories implied in felony.

6. But as to felonies by act of parliament, Lord Hale distinguishes thereupon as follows: Regularly (he says) if an act of Parliament enact an offence to be felony, tho' it mention nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offence, Accessories in felonies by statute.

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are

Accessory.

are accessaries before, and those that knowingly receive the offender are accessaries after. 1 *H. H.* 613.

But if the act of parliament that makes the felony, in express terms comprehend accessaries before, and make no mention of accessaries after, namely, receivers or comforters, there it seems there can be no accessaries after; for the expression of procurers, counsellors, or abettors, all which import accessaries before, make it evident, that the law-makers did not intend to include accessaries after, which is an offence of a lower degree than accessaries before. 1 *H. H.* 614.

Offence, of accessaries, varied.

And altho' it be generally true, that an act of parliament creating a felony, renders consequentially accessaries before and after within the same penalty, yet the special penning of the act sometimes varies the case: Thus *Eng. stat. Hen. 7. cap. 2.* for taking away women, makes the taking away, and the procuring and abetting, yea and wittingly receiving also, to be all equally principal felonies, and excluded of clergy. Again, *Eng. stat. 27 Eliz. cap. 2.* makes the coming in of a jesuit treason, the receiving or relieving of him felony, the contributing of money to his relief a *premunire*. So that acts of parliament may diversify the offences of accessory or principal, according to the various penning thereof, and so have done in many cases. 1 *H. H.* 614, 615.

Excluding from clergy.

7. Also a statute excluding the principals from the benefit of clergy, doth not thereby exclude the accessaries before or after; neither doth a statute, excluding the accessaries, thereby exclude the principals. 2 *Haw.* 342.

II. Of accessaries before the fact.

Accessory before the fact,

An accessory before the fact committed, is he that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony.

Being absent at the time of the felony committed] For if he is present, he is not an accessory, but a principal.

So also, if divers come to commit an unlawful act, and be present at the time of the felony committed, tho' one of them only doth it, they are all principals. *Hale's Pl.* 215.

Aiding, abetting, or comforting,

So if one present move the other to strike; or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes: for they are *present*, aiding, abetting, or comforting. *id.* 216.

Setting out on a common design.

So if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in it self, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour (if need be) the escape of those who are more immediately engaged: they are all, provided the fact be committed, in the eye of the law *present* at it. For it was made a common cause with them; each man operated in his station at one and the same instant towards the same common

common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprize. *Foster's Crown Law. 350.*

But if one came casually, not of the confederacy, tho' he hindered not the felony, he is neither principal nor accessory, altho' he apprehend not the felon; but for his negligence he is punishable by fine and imprisonment. *Casually present.*

Hale's Pl. 216. 2 Haw. 313.

Also in some cases, even a person absent may be principal; as he that puts poison into any thing to poison another, and leaves it, tho' not present when it is taken: And so it seems all that are present when the poison is so infused, and consenting thereunto. *Persons absent may be principals. Hale's Pl. 216.*

Procure, counsel, command, or abet] But here note some diversities: As, *Commanding.*

(1.) *When the principal doth not accomplish the fact altogether in the same sort, as it was beforehand agreed between him and the accessory.* And therefore if one commands another to lay hold upon a third person, and he lays hold upon him and robs him, the person commanding is not accessory to the robbery; for his command might have been performed without any robbery. *Dalt. c. 161*

But if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof; the person commanding shall be accessory to the murder; for it is a hazard in beating a man, that he may die thereof. *Dalt. c. 161.*

(2.) *He that commandeth or counselleth any evil or unlawful act to be done, shall be adjudged accessory to all that shall ensue upon the same evil act, but not to any other distinct thing.* *Counselling,* As if one command another to steal a horse, and he stealeth an ox; or to rob a man by the highway of his money, and he robs him in his house of his plate; or to burn such an one's house, and he burneth the house of another: These are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessory to them. *Dalt. c. 161.*

(3.) *But if a person commit the same felony, which another did command or counsel to be done, tho' he doth it at another time, or in another place, or in another sort than was commanded or counselled, yet here such person commanding or counselling shall be accessory.* *In what cases accessory.* As if he doth counsel to kill a man by poison, and he kills him with a dagger; or to kill him by the highway, and he kills him in his house; or to kill him one day, and he kills him on another day; in these and the like cases, he shall be accessory. *Dalt. cap. 161.*

(4.) *Those offences which in the construction of law are sudden and unpremeditated, cannot have any accessories before.* *No accessories in sudden offences.* As killing a man by misadventure, in his own defence, or manslaughter: For in such case there can be no procuring, counselling, commanding, or abetting. But there may be accessories after. *1 H. H. 616.*

(5.) It seems to be generally agreed, that *he who barely conceals a felony, which he knows to be intended, is guilty only of a misprision of felony, and shall not be judged an accessory;* *Concealing a felony.* for this is not procuring, counselling, or abetting. *2 Haw. 317.*

(6.) Also, if a man counsels or commands another to kill a person, and before he hath killed him, he who counselled or commanded it, repents, and countermands it, charging him not to kill him, and yet after he doth

Accessory.

kill him; here such person countermanding shall not be adjudged accessory to the murder: For, generally, the law adjudgeth no man accessory to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. *Dalt. c. 161.*

Felonious advice.

(7.) But if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice; he is an accessory to the murder, tho' at the time of the advice, the child not being born, no murder could be committed of it: For the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon, as if he had given his advice after the birth. 2 *Haw. 315.*

III. of accessories after the fact.

Accessory after the fact.

Accessory after the fact is, where a person knowing the felony to be committed by another, relieves, comforts, or assists the felon.

Knowing the felony,

Knowing the felony to be committed] There can be no doubt, but that it is necessary that the receiver have notice of the felony, either express or implied, and so to be laid in the indictment, that the receiver *knew* that the person received by him, had committed the principal felony. 2 *Haw. 319.*

The felony] This, as hath been said, holds place only in *felonies*, and in those felonies, where by the law judgment of death regularly ought to ensue; and therefore, not in petit larceny. 1 *H. H. 618.*

Receiving trespassers, &c.

And therefore if a person do barely receive, comfort, or conceal an offender guilty of any common trespass, or inferior crime of the like nature, tho' he know him to have been guilty, and that there is a warrant out against him, yet he is not an accessory to the offence; but perhaps in such case he may be indictable for a contempt of the law, in hindring the due course of justice. 2 *Haw. 311.*

Assisting a felon,

Relieves, comforts, or assists the felon] In the explication of these words, several things are considerable;

(1.) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessory to the felony; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. 2 *Haw. 317.*

Misprision,

(2.) But if a man knows that a person hath committed a felony, but doth not discover it, this doth not make him an accessory, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. 1 *H. H. 618.*

Seeing a felony committed.

(3.) Also if a man sees another commit a felony, but consents not, nor yet takes care to apprehend him or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessory. 1 *H. H. 618.*

Suffering a felon to escape.

(4.) In like manner if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him access-

ry;

Accessory.

ry; but if he take money of the felon to suffer him to escape, this makes him accessory: And so it is if he shut the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessory; for here is not a bare omission, but an act done by him to accommodate the felon's escape. 1 *H. H.* 619.

(5.) Also it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessory to the felony. 2 *Haw.* 318. Rescue of a felon.

(6.) But if a felon be in prison; he that relieves him with necessary meat, drink, or cloaths, for the sustentation of life, is not accessory. 1 *H.* Relieving in prison,
H. 620.

(7.) So if he be bailed out; it is lawful to relieve and maintain him, for he is still in some sort in custody, and is under a certainty of coming to his trial. 1 *H. H.* 620. or when bailed,

(8.) But if a felon be in goal; for a man to convey instruments to him to break prison or make an escape, or to bribe the gaoler to let him escape, makes the party an accessory; for tho' common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *H. H.* 621. Assisting to break prison, &c.

(9.) The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessory; but it is a high contempt. *Hale's Pl.* 219.

(10.) A man may be accessory to an accessory, by the receiving of him knowing him to be an accessory to felony. 1 *H. H.* 622. Accessory to an accessory.

(11.) If a man hath goods stolen, and he receives his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessory; but if he take money of him to favour him, whereby he escapes, this makes him accessory. 1 *H. H.* 619.

(12.) And if any persons shall buy or receive any goods that shall be stolen, knowing the same to be stolen, they shall be deemed accessories to the felony after the fact. *Stat. 9 Wil. 3. cap. 32. Sect. 4.* And buying the goods at an undervalue, is a presumptive evidence, that he knew they were stolen. 1 *H. H.* 619. Receiving stolen goods. And if any persons shall receive or buy any goods stolen, knowing the same to be stolen, or shall harbour or conceal any burglars, felons or thieves, knowing them to be such, they shall be deemed accessories to the said felonies, and being of either of the said offences convicted by the testimony of one credible witness, such offender shall suffer death as a felon. *Stat. 8 Anne cap. 8. Sect. 5.* Harbouring felons.

(13.) It seems agreed, that the law hath such a regard to that duty, love, and tenderness which a wife owes to her husband, as not to make her an accessory to felony by any receipt given to her husband; yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact, in the same manner as if she had been sole. Also it seems agreed, that no other relation, besides that of a wife to her husband, will exempt the receiver of a felon from being an accessory to the felony; from whence it follows, that if a master receive a servant, or a servant Wife, when accessory.
Other relations.

Accessory.

a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another. 2 *Haw.* 320.

Husband ignorant,

(14.) But if the wife alone, the husband being ignorant of it, do receive any other person being a felon; the wife is accessory, and not the husband. 1 *H. H.* 621.

(15.) But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife shall be acquitted. 1 *H. H.* 621.

IV. How they are to be proceeded against.

Accessories how farailable.

1 By *Eng. Stat.* 3 *Edw.* 1. *cap.* 15. Those who are accused of the receipt of felons, or of commandment, or of force, or of aid of felony done, shall beailable; but this seemeth to be only where it stands indifferent whether the party be guilty or innocent: for if there be strong presumptions of guilt, it seemeth that he is notailable. 2 *Haw.* 102.

In what county to be tried.

2. Where a person is feloniously stricken or poisoned in one county, and dies thereof in another county, the accessory may be indicted in the county where the death shall happen. *Stat.* 10 *Car.* 1. *sess.* 2. *cap.* 19. *sect.* 2. 3.

Also Where a murder or felony shall be committed in one county, and a person shall be accessory in another county, the accessory may be indicted in the county where he was accessory: And the judges of Assize, or two of them, of the county where the offence of the accessory shall be committed, on suit to them made, shall write to the keeper of the records where the principal shall be convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged; which he shall certify under his seal. *Stat.* 10. *Car.* 1. *sess.* 2. *cap.* 19. *sect.* 4.

Accessory and principal in the same indictment.

3. The accessory may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony. 1 *H. H.* 623.

Principal to be tried.

4. It seemeth that the accessory may be put to answer before the principal hath appeared; but his plea cannot be tried before such appearance, unless he desires it himself; but if he will put himself upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon such trial, is good. 2 *Haw.* 322. 1 *H. H.* 623.

But it seemeth necessary in such case to respite judgment, till the principal be convicted; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him: But if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 1 *H. H.* 623, 624.

Both tried by one inquest.

5 It seems to be settled at this day, that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest: but that the principal must be first convicted; and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty. But it seems agreed, that if the prin-

principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer, till that plea be determined; for if it be found for the principal, the accessory is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. *2 Haw. 323. 1 H. H. 624.*

6. But in the case of stolen goods, if the principal cannot be taken, the buyer or receiver may be prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, altho' the principal be not convicted; which shall exempt the offender from being punished as accessory, if the principal be afterwards taken and convicted. *Stat. 4. Ann. cap. 11. sect. 5. and Stat. 8. Ann. cap. 8. sect. 6.*

Accessory may be tried, tho' the principal be not attainted.

7. It seemeth not reasonable, Mr. *Hawkins* says, where a person is charged as accessory to more than one principal, to try him on the conviction of one, before all of them have appeared; because hereby he may be subject to the hardship and hazard of two trials for his life for the same offence, which is contrary to the general course of the law. *2 Haw. 323.*

Case where a person is charged as accessory to more than one.

But if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him. *Fost. 361.*

And therefore the court in their discretion (Sir *Michael Foster* says) may arraign him as accessory to such of the principals who are convicted; and if he be found guilty as accessory to them or any of them, judgment shall pass upon him: But on the other hand, if he be acquitted, that acquittal will not discharge him as accessory to the others. And when they come in and are convicted and attainted, or if judgment of outlawry passeth against them, he may be arraigned *de novo* as accessory likewise to them. Altho' it is the safer course (according to lord *Hale*) to respite the arraignment of the accessory, till all appear or are outlawed. *Fost. 361.*

8. If the principal be erroneously attainted, yet the accessory shall be put to answer, and shall not take advantage of the error in that attainder; but the principal reversing the attainder, reverseth the attainder of the accessory. *1 H. H. 625.*

Case where the principal is erroneously attainted.

But upon this, Sir *Michael Foster* distinguisheth as follows: If the principal and accessory are joined in one indictment and tried together, which seems to be the most eligible course where both are amenable to the court; there is no room to doubt, whether the accessory may not enter into the full defence of the principal, and avail himself of every matter of fact, and every point of law tending to his acquittal. For the accessory is in this case to be considered as a partner in the suit, and this sort of defence necessarily and directly tendeth to his own acquittal. *Fost. 365.*

But when the accessory is brought to his trial, after the conviction of the principal; it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact guilty. It is sufficient if it reciteth, with proper certainty, the record of the conviction. This is evidence against the accessory, sufficient to put him upon his defence. For it is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must, as it seemeth, give way

Accessory.

way to facts manifestly and clearly proved. As against the accessory, the conviction of the principal will not be conclusive; it is as to him *res inter alios acta*. *id.*

And therefore if it shall come out in evidence upon the trial of the accessory, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged; the accessory may avail himself of this, and ought to be acquitted. *id.*

And as in point of *law*, so also in point of *fact*, if it shall manifestly appear in the course of the accessory's trial, that the principal was innocent; common justice seemeth to require that the accessory should be acquitted. As suppose a man is convicted upon circumstantial evidence, strong as that sort of evidence can be, of murder. Another is afterwards indicted as accessory to this murder; and it cometh out upon the trial by incontestable evidence, that the person who was supposed to be murdered is still living; in this case certainly the person indicted as accessory shall be acquitted. Or suppose the person to have been in fact murdered, and that it should come out in evidence to the satisfaction of the court and jury, that the witnesses against the principal were mistaken in his person (a case of this kind Sir *Michael Foster* says he has known), that the person convicted as principal was not nor could possibly have been present at the murder. *id.* 367, 368.

Accessory acquitted may be indicted as principal.

9. If one person be indicted as principal, and another as accessory, and both be acquitted; yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. 1 *H. H.* 625.

Principal acquitted may not be indicted as accessory before.

10. But if a person be indicted as principal and acquitted; lord *Hale* says, he shall not be indicted as accessory before: And if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *H. H.* 626.

But Sir *Michael Foster* observes upon this, that in the eye of the law, the offences of principal and accessory do specifically differ; and if a person indicted as principal, cannot be convicted upon evidence tending barely to prove him to have been accessory before the fact, which must needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a second for an offence specifically different from it. *Fost.* 362.

Principal acquitted may be indicted as accessory after.

11. So if a man be indicted as principal, and acquitted; he may be indicted as accessory after, for they are offences of several natures. 1 *H. H.* 626.

Accessory before, acquitted, may be indicted as accessory after.

12. And so it is, if he be indicted as accessory before, and acquitted; yet for the same reason he may be indicted as accessory after. 1 *H. H.* 626.

Indictment

Indictment of an accessory before the fact, taken from Coke's report of Lord *Sanchar's* case, 9 Co. 116. which, as the prosecution was by the King's special command, was probably drawn by good advice; and on which *Robert Creighton*, esquire, (Lord *Sanchar* of *Sotland*) was convicted and hanged; viz.

Middlesex. **T**HE jurors do present for the lord the king upon their oath, That whereas Robert Carliel late of London, yeoman, and James Irweng late of London aforesaid, yeoman, not having God before their eyes, but seduced by the instigation of the devil, the eleventh day of May in the year of the reign of our lord James by the grace of God of England, France, and Ireland, king, defender of the faith, and so forth, the tenth, and of Scotland the forty-fifth, at London, that is to say, in the parish of St. Dunstan in the West, and in the ward of Farringdon without London aforesaid, &c. with force and arms, &c. feloniously and of their aforethought malice, in and upon one John Turner then and there in the peace of God and of the said lord the king being, made an assault and affray, and the aforesaid Robert Carliel a certain gun [tormentum] called a pistol, of the value of 5s. then and there charged with gunpowder and a leaden bullet, which gun the said Robert Carliel in his right hand then and there had and held, in and upon the aforesaid John Turner then and there feloniously, voluntarily, and of his malice forethought, did shoot off and discharge; and the aforesaid Robert Carliel, with the leaden bullet aforesaid from the gun aforesaid then and there shot and discharged, the aforesaid John Turner in and upon the left part of the breast of him the said John Turner, near the left pap of him the said John Turner, then and there feloniously struck, giving to the said John Turner then and there with the leaden bullet aforesaid out of the gun aforesaid then and there shot off and discharged, in and upon the left part of the breast of him the said John Turner, one mortal wound the breadth of half an inch, and depth of five inches, of which mortal wound of the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, instantly died: And that James Irweng, feloniously and of his forethought malice, then and there was present, aiding, assisting, abetting, comforting, and maintaining the aforesaid Robert Carliel to the felony and murder aforesaid in form aforesaid to be done and committed; and so the aforesaid Robert Carliel and James Irweng the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice, killed and murdered, against the peace of the lord the now king, his crown and dignity; And that one Robert Creighton, late of the parish of St. Margaret in Westminster, in the county of Middlesex, esquire, not having God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid by the aforesaid Robert Carliel and James Irweng in manner and form aforesaid done and committed, that is to say, the tenth day of May in the year of the reign of our lord James by the grace of God of England, France, and Ireland, king, defender of the faith, and so forth, the tenth, and of Scotland the forty-fifth, the aforesaid Robert Carliel, at the aforesaid parish of St. Margaret in Westminster aforesaid, in the county of Middlesex aforesaid, to the felony and murder aforesaid, in manner and form aforesaid to be done and commit-

Accessory.

ted, maliciously, feloniously, voluntarily and of his forethought malice, did incite, move, abet, counsel and procure, against the peace of the said lord the king that now is, his crown and dignity.

If after the fact, then the form may be thus :

And that A. O. late of——in the county of——yeoman, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on the——day of——in the——year of the reign of——at——aforesaid in the county aforesaid, with force and arms, him the said——did then and there feloniously, and of his malice forethought, receive, aid, and comfort; against the peace of the said lord the king that now is, his crown and dignity.

Addition.

Cases where additions are required.

TO prevent the inconvenience of troubling one person for another, it is enacted by *Eng. stat. 1. Hen. 5. cap. 5.* that in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants additions shall be made, of their estate or degree or mystery, and of the towns, or hamlets, or places, and counties, of the which they were, or be : And if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any outlawries be pronounced, they shall be void; and before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party.

When the exigent is awarded.

In which the exigent shall be awarded] The exigent is a writ whereby the sheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by these words the act extendeth only to cases where process of outlawry may be awarded; and therefore it extendeth not to an indictment for incroaching on a highway, because in that case process of outlawry lieth not, but a distress. *Croke Eliz. 148.*

To the names of the defendants.

To the names of the defendants] Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other suits by his christian name and surname, and that, before this act, sufficed; but if he had a name of inferior dignity (as knight or banneret) he ought to be named by his christian name and surname, and by the addition of his name of dignity. *2 Inst. 666.*

Corporations sole.

If there be a corporation of one sole person, that hath a fee simple, and may have a writ of right, he may be named by the common law by his christian name without any surname, as *John* bishop of *P.* *2 Inst. 666.*

If

Addition.

I 1

If it be a corporation aggregate of many able persons, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname. *2 Inst.* 666. Corporations aggregate.

A duke, marquiss, earl, viscount, or baron might by the common law be named by his christian name, and by the name of his dignity; as *John* duke of *M.* *2 Inst.* 666. Names of dignity.

Additions shall be made] The addition as well of the estate, degree, or mystery, as the town, hamlet, or place, ought by force of this act to be alleged in the first name; for an addition after the *alias dictus* is ill: As for instance, where the indictment was against *W. R.* otherwise called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not sufficiently named in the first part, the *alias* cannot aid or help it. *2 Inst.* 669. *3 Salk.* 20. What additions are requisite.

Where there are several defendants of different names, and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. *2 Haw.* 187.

Where a father hath the same name and the same addition with a defendant being his son, the action is abateable unless it add the addition of *the younger* to the other additions; but where the father is the defendant, it is said that there is no need of the addition of *the elder.* *2 Haw.* 187.

Of their estate or degree] Esquire is a good addition; and the sons of all peers and lords of parliament in the life of their fathers, are in law esquires, and so to be named. Also the eldest son of a knight is an esquire, *2 Inst.* 667. Esquire.

And it seems clear, that no one can be well described by the addition of a temporal dignity of any other nation besides our own; because no such dignity can give a man a higher title here, than that of an esquire. *2 Haw.* 187. Foreign titles.

Gentleman and gentlewoman are good additions; and if a gentlewoman be named spinster, she may abate and quash the writ or indictment. *2 Inst.* 668. Gentleman.

A gentleman by reputation, that is neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a sufficient addition; but if he be named yeoman, he cannot quash the indictment. *2 Inst.* 668.

Lord *Coke* says, he that hath taken any degree in either of the universities, may be named by that degree without question. *2 Inst.* 668. But this is doubted by others. *2 Haw.* 187. Degree.

Clerk is a good addition of a clergyman. *2 Inst.* 668. Clerk.

Yeoman and labourer are good additions, and are applied only to the man, and not to the woman. *2 Haw.* 188.

Widow or singlewoman, or (as some say) wife of such a one, are all of them good additions of the estate and degree of a woman; but no such like addition is good, for the estate and degree of a man. And spinster is a good addition for the estate and degree of a woman, and perhaps also for that of a man. *2 Haw.* 188. Widow. Wife. Spinster.

Addition.

Trades or occupations.

Or mystery] This includeth all lawful arts, trades and occupations, as taylor, merchant, mercer, parish clerk, schoolmaster, husbandman, labourer, and the like. 2 *Haw.* 188.

But servant, groom, or farmer, are not additions within this act, because they are not of any mystery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any mystery or occupation. 2 *Inst.* 668.

Having divers trades.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretic, and such like. 2 *Haw.* 188.

If a man have divers arts, trades or occupations, he may be named by any of them; but if a gentleman by birth be a tradesman, he shall not be named by his trade, but by the degree of a gentleman, because it is worthier than the addition of any mystery. And in general a man shall be named by his worthiest title of addition. 2 *Inst.* 668, 669.

Of the towns or hamlets.

And of the towns or hamlets] If there be two towns in a county of the same principal name, with different additions to distinguish them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant be named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the same county, and none without an addition. But if there be two towns of the same name in a county, without any addition to distinguish them, it may be sufficient in such case to name the defendant generally of either of such towns, without adding any thing to distinguish it from the other. 2 *Haw.* 189.

If the defendant live in a hamlet of a town, it is said to be in the election of the party to name him either of the hamlet or of the town. 2 *Haw.* 189.

Addition of parish.

But the addition of a parish, if there be two or more towns in it, is not good; but if there be but one town, the addition of parish is good. 2 *Inst.* 669.

The addition of the place of habitation of a wife, is sufficiently shewn, by shewing that of the husband; because it shall be intended that the wife lives where the husband does. 2 *Haw.* 190.

Addition of places.

Or places) If the defendant lives in a place known by a special name, and lying out of any town or hamlet, he may be well named of such place; but if he live in any place known within a town or hamlet, it is said to be safest to name him of the town or hamlet. 2 *Haw.* 189, 190.

Late of such a place.

Of the which they were, or be) The addition of the estate, degree, or mystery, ought to be as the defendant was of at the day of the indictment brought, and not late of such a degree or mystery; but it is a good addition to name the defendant late of such a town or place, because men do often remove their habitation. 2 *Inst.* 670.

Voidable by error of plea.

Shall be void) This being a judgment in law is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias ut legatum*; for tho' the statute saith they shall be void, yet they are but voidable by a writ of error or plea. 2 *Inst.* 670.

By

Addition.

13

By the exception of the party) But if the defendant appeareth upon process, and plead, taking no advantage thereof by exception, he hath lost the benefit hereof: But it seemeth that the bare appearance of the party, without plea, doth not salve the want of a good addition. 2 Haw. 190.

Pleading without excepting.

Affray.

I. What is an Affray.

II. How far it may be suppressed by a private person.

III. How far by a constable.

IV. How far by a justice of the peace.

V. Punishment of an affray.

I. What is an affray.

I. **A**N affray is a publick offence to the terror of the king's subjects; (according to lord Coke) so called because it affrighteth and maketh men afraid. 3 Inst. 158.

Affray what.

2. From whence it seemeth clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned, in which case it cannot be said to be to the terror of the people. 1 Haw. 134.

Assault without an affray.

3. Also it is said; that no quarrelsome or threatening words whatsoever, shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person who threatens to beat him, before a justice in order to find sureties. 1 Haw. 135.

Words not an affray.

4. Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. 1 Haw. 135.

Challenging to fight.

5. But altho' no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute: For by Eng. stat. 2 Ed. 3. c. 3. it is enacted, that no man of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices, or other ministers, or elsewhere; upon pain

Affray may be without actual violence.

Affray.

shall pain to forfeit their armour to the king, and their bodies to the prison at the king's pleasure. And the kings justices in their presence, sheriffs and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables and wardens of the peace within their wards, shall have power to execute this act. And the judges of assize may punish such officers as have not done their duty herein.

Upon a cry for
arms.

Upon a cry made for arms to keep the peace) It is holden upon these words of exception, that no person is within the intention of this statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. 1 Haw. 136.

Wearing arms
to terrify.

In affray of peace) *En effrayer de la pees*; Lord Coke has it *pais*, of the country, or the people; and so, he observes, that the writ grounded upon this statute saith, *In quorundam de populo terrorem*; and therefore the printed book, *in affray of peace*, ought to be amended. 3 Inst. 158.

And it is holden upon these words, that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute, by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace. 1 Haw. 136.

Nor to go nor ride armed) It is holden, that a man cannot excuse the wearing such armour in publick, by alledging that such a one threatned him, and that he wears it for the safety of his person from his assault; but it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is his castle. 1 Haw. 136.

Their bodies to prison) *Eng. stat. 20 Ric. 2. cap. 1.* adds a fine.

Justices may
act *ex officio*.

Wardens of the peace) It is holden that any justice of the peace, or other person who is impowered to execute this statute, may proceed thereon *ex officio*; and if he find any person in arms, contrary to the form of the statute, he may seize the arms, and commit the offender to prison; and that he ought also to make record of the whole proceeding, and certify the same into the Exchequer. 1 Haw. 135.

II. How far it may be suppressed by a private person.

Private per-
sons.

1. It seems agreed, that any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to

to the constable to be carried before a justice, to find sureties for the peace.

1 *Haw.* 136.

2. And the law doth encourage him hereunto; for if he receives any harm by the affrayers, he shall have his remedy by law against them; and if the affrayers receive hurt, by the endeavouring only to part them, the standers by may justify the same, and the affrayers have no remedy by law. 3. *Inst.*

Hurting affrayers.

158.

3. But if either of the parties be slain, or wounded, or so stricken that he falleth down dead; in that case the standers by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry; or else for his escape they shall be fined and imprisoned. 3 *Inst.* 158.

Apprehending affrayers.

III. How far by a Constable.

1. It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which happens in his presence; but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment.

Constable's duty.

1 *Haw.* 137.

2. And it is said, that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation: But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol, till he shall be punished for his offence: And it is said, that he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such case, is to command them under pain of imprisonment to avoid fighting. 1 *Haw.*

May imprison affrayers.

137.

3. But he is so far intrusted with a power over all actual affrays, that tho' he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party. 1 *Haw.* 137.

Suppressing affrays.

4. And if an affray be in an house, the constable may break open the doors to preserve the peace; and if affrayers fly to an house, and he follow with fresh suit, he may break open the doors to take them. 1 *Haw.* 137.

May break open doors.

5. But it is, that a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it. 1 *Haw.* 137.

May preserve the peace.

IV. How

IV. How far by a justice of the peace.

Justice's duty. There is no doubt, but that a justice of the peace may and must do all such things to the aforesaid purpose, which a private man or constable are either enabled or required by the law to do: But it is said, that he cannot without a warrant authorize the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. 1 Haw. 137.

V. Punishment of an affray.

Fine and imprisonment. All affrays in general are punishable by fine and imprisonment. 1 Haw. 138.
Nuisances. And they are inquirable in the leet, as common nuisances. 3 Inst. 158.

Warrant to apprehend affrayers.

County of Dublin, { To the constable of—

WHEREAS A. I. of — yeoman, hath this day made oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that on the — day of — in the — year of the reign of — A. O. of — yeoman, and B. O. of — yeoman, at — in the said county, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them the said A. O. and B. O. without any lawful or sufficient provocation given to them, or to either of them, by him the said A. I. These are therefore to command you forthwith to apprehend the said A. O. and B. O. and bring them before me, or some other of his said Majesty's justices of the peace for the said county, to answer the premisses, and to find sureties as well for their personal appearance at the next general quarter-sessions of the peace to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence, as also for their keeping the peace in the mean time, towards his said Majesty and all his liege people, and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril. Given under my hand and seal at — in the said county, the — day of, &c.

Indictment for an affray.

THE jurors for our lord the king, upon their oath present, that A. O. of — in the county of — taylor, and B. O. of — in the said county, blaksmith, with force and arms, on the — day of — in the — year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at — aforesaid in the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, to the terror and disturbance of divers of the subjects of our said sovereign lord the king then and there being, and to the evil example of all other the subjects of our said sovereign lord the king, and against the peace of our said lord the king, his crown and dignity.

I. Concerning

- I Concerning inns and alehouses in general.
- II. Selling ale without licence.
- III. Licensing alehouses.
- IV. Innkeepers obliged to receive guests.
- V. Concerning ale vessels, and the measure of ale.
- VI. Concerning drunkenness.
- VII. Detaining goods for the reckoning.
- VIII. Goods of a guest stolen out of an inn.
- IX. Guests stealing goods.

I. Concerning inns and alehouses in general.

1. EVERY inn is not an alehouse, nor is every alehouse an inn: but if an inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn. Difference between inns and alehouses.
2. It was resolved by all the judges, that any person might erect an inn to lodge travellers, without any licence or allowance for such erection. Dalt. c. 56. Black. 170. Licence to erect inns.

3. But it seems to be agreed, that the keeper of an inn may by the common law be indicted and fined, as being guilty of a publick nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other antient and well governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. 1 Haw. 225. Inn indictable.

4. and if an inn useth the trade of an alehouse, as almost all innkeepers do, it shall be within the statutes made about alehouses. Dalt. 133. Black. 170. Innkeeper selling ale.

5. It hath been also agreed for law, that innkeepers ought to have licence, and be bound by recognizance for keeping good order, as alehousekeepers are. Dalt. 24. Inns to be licensed.

6. By the commission of the peace, two justices (1 Q.) may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights or measures, or in the sale of victuals, against the form of the ordinances in that behalf made. Power of justices by the commission.

7. No keeper of any tavern, alehouse, or publick victuallinghouse, shall entertain or permit to remain in his house any person during the time of divine service, except those who are of their own family or lodgers in the said house, or furnish them with liquor of any sort, upon the penalty of forfeiting of ten shillings for every such offence, and also five shillings to be forfeited by every such person who shall enter or remain in such taverns, alehouses or victualling-houses contrary to this act. 7 Will. 3. cap. 17. sect. 8. During divine service.

8. All constables and churchwardens within cities and towns corporate, are required frequently to enter into all taverns, ale-houses and victuallinghouses, within their parishes or districts, where they shall reasonably suspect any person to be contrary to the intent of this act, and to apprehend such Constables and churchwardens.

Alehouses.

Committal of offenders.

such persons as they shall find or reasonably suspect to be offenders against the same, and also the master of such house where such offenders shall be apprehended, and them in custody to carry before some justice of peace near the place, which justice is impowered to examine witnesses upon oath touching the breach of this law, and after examination to proceed to a conviction or acquittal of the persons accused, which shall be final to all parties; and if such justices shall upon proof convict the persons accused, the said justice shall demand from such offenders the penalties imposed by this act and receive the same, and in default of payment commit the offenders to the goal of the county till he shall have made payment of the same, which sum shall be applied to the use of the poor of the respective parishes where such offences shall be committed. *Secl. 9.*

Travellers excepted.

9. Provided nothing herein contained shall extend to persons who have been in any inns before and design to abide there on *Sunday*, but it shall be lawful for such persons to remain in such inns and publickhouses as if this act had never been made. *Secl. 10.*

Giving credit to servants, &c.

10. No retailer of strong beer or spirituous liquors who shall sell upon trust or credit any strong beer, ale, brandy, geneva, rum, aquavita, or other spirituous liquors, to any servant or day-labourer, or to any other person usually working or plying for hire or wages, to the amount of any sum exceeding one shilling, shall have any remedy to recover the same, either at law or in equity against any of the persons aforesaid, their executors or administrators, and all promissory notes, bonds, or other writings obligatory, given as a security for the payment of such debts are declared void. *Stat. 9 Geo. 2. cap. 8. secl. 1.*

Pawns or pledges.

11. In case any such servant or day-labourer or other persons who usually work or ply for hire or wages, shall leave any pawn or pledge as a security for the payment of any sum exceeding one shilling contracted in such manner, such servant or day-labourer or any person usually working or plying for hire, may complain to the chief magistrate of any city or town-corporate or to any justice of the peace where such retailer of beer, ale, or other spirituous liquors usually resides, that such pledge or pawn is detained from him or her by such retailer of beer, ale, or spirituous liquors, and having made proof thereof upon oath, the chief magistrate or justice of the peace is required by warrant under his hand and seal to compel such retailer of beer, ale, or spirituous liquors by distress and sale of his goods to restore the aforesaid pawn to the party complaining, or to make him satisfaction for the loss or abuse thereof. *Ibid. Secl. 2.*

To be restored by warrant.

II. Selling ale without licence.

Selling ale without licence.

1. No person shall keep any common alehouse, or tippling-house, or use common selling of beer or ale by retail without licence as aforesaid, upon pain that every person, shall for every time he so offends, forfeit to his Majesty the sum of five pounds. *Stat. 14 and 15 Car. 2. cap. 18. secl. 8.*

Penalty.

2. In case any person shall presume contrary to this act, or shall incur any forfeiture or penalty therein mentioned, such persons shall be proceeded against and punished; either in his Majesty's court of Exchequer, or before the justices of assize at the general assizes, or the justices of the peace at

at their quarter-sessions, who are impowered to hear and determine the same, in such manner as to each of them respectively in their discretions shall be thought fit, as well for punishing of the offenders by fine and imprisonment or otherwise. *Ibid.* Sect. 12. This clause is altered by sec. 5.

3. Provided that such persons as shall sell ale or beer, only in places where the general assizes or the quarter-sessions shall be kept during the time of the assizes or sessions, or at fairs during the time of the fairs, shall not be impeached for keeping or selling the same without licence. *Ibid.* sect. 10. This clause is altered by sect. 7.

4. Stat. 33 Geo. 2. Cap. 10. sect. 93. If any persons shall sell any beer or ale, or any wine, brandy, aqua vitae, or other spirits by retail, at any fair, assizes, or sessions, or other place without such licence first obtained, the persons so offending, shall, for every such offence, forfeit five pounds, which duties, and all forfeitures arising from the sale of such liquors, without such licence, shall be paid to the collectors of excise, in their several districts, Penalty.

5. Sect. 94. And in case of refusal, or default of such payment, after demand made, the collectors, or other officers of excise employed for that purpose, may, at any time, with the assistance of a constable, in the day-time, levy such sums as ought to be paid for such licences, and all forfeitures for selling without such licences, and all the arrears thereof, by distress and sale of the parties goods, in such manner as the hearth-money is appointed to be collected, by Stat. 17 and 18. Car. 2. cap. 18. Default of payment.

6. By Stat. 17 and 18 Car. 2. cap. 18. sect. 7. If any question or difference shall arise about the taking of any distress or levying any monies by virtue of this or the former act, the same shall be heard and finally determined by one or more justices of the peace near adjoining or chief magistrate of the place respectively, upon complaint in that behalf; and the justices of the peace and chief magistrates, and other his Majesty's officers within their several limits and jurisdictions, are required to give assistance to such officers as shall be so appointed for the collecting of the said duty according to the said former and this present act. Complaint to a justice,

7. Stat. 33 Geo. 2. cap. 10. It shall be lawful for any person, except such persons under licence, who brew their own beer or ale for retail, who shall buy beer or ale at any publick brewery, and obtain a certificate from such brewer, as also from the gauger of the district, that such beer or ale was brewed in such publick brewery, and hath paid the excise, to sell the same without licence at any fair, assizes, sessions, race, or other publick meeting, without being liable to any of the penalties herein before contained. Sect. 97. Selling ale at fairs, &c.

This act is continued for two years, &c. from the 24th of June, 1764, by Stat. 3 cap. 21. sect. 1.

III. Licensing alehouses.

1 Stat. 33 Geo. 2. cap. 10. It shall be lawful for the chief commissioners and the collectors of excise, in their several districts, to take recognizances from the persons applying for licence to sell and retail any kind of wines, strong waters, or other distilled liquors, with one sufficient surety, in the sum Recognizances of ale-house-keepers.

Alehouses.

of thirty pounds, the condition of which recognizances shall be, that the parties so licenced, shall sell victuals, beer, ale, wine, and strong waters at reasonable rates, and shall not make or utter any unwholsome bread, beer, ale, wine, or strong waters, or victuals, and shall not use or suffer any drunkenness or excessive drinking, or any dicing or gaming, and shall keep good order and rule in his house, nor willingly harbour any suspected persons, or any of ill behaviour, or any of the neighbours servants, during the time of such licences; *f. 93.*

Certificate of
the next jus-
tice.

2. Provided, that no collector do grant any such licence, unless a certificate be first produced and lodged with him, signed by the next residing justice of peace, who shall not be an officer of his Majesty's revenue, setting forth, that such person is properly qualified, and also, that the place of his abode is a fit and proper place for selling and retailing ale or beer, or wines, strong waters, or other spirituous liquors respectively (according to the application made) and in case any collector shall grant any licence, without such certificate so lodged with him, or without taking such recognizance as aforesaid, he shall forfeit fifty pounds, one moiety thereof, to his Majesty, and the other moiety to such persons as shall inform and sue for the same, in any court of record, in which no essoign, protection, wager of law, or more than one imparlance shall be allowed. *Sect. 94.*

Account of li-
cences to be
returned.

3. The collectors of excise, shall, on or before the first day of *Midsummer* quarter-sessions, which shall be held after the commencement of this act, for the several counties within the respective districts, return, under their hands and seals, to the clerks of the peace, or their deputies for such counties respectively, distinct accounts of the names and places of abode of every person then licenced to sell ale, beer, wine, or strong waters by retail, within such counties, together with their several recognizances, and also the sums of money severally to be paid for the said licences, the said returns and recognizances to be kept among the records of the said county; and the said collector shall continue in like manner so to do, on or before the first day of every *Midsummer* quarter-sessions, to be thereafter held within their respective districts, during the continuance of this act. *f. 95.*

Clerks of the
peace to file
returns.

4. The said clerks of the peace, or their deputies, shall file such returns and engross copies on parchment of the names of the persons so licenced, and the sums they pay, and the names of the sureties of the persons so licenced, and hang up in some conspicuous part of the session-house, on the first day of the next ensuing sessions to be held after such return shall be made, there to continue till the end of such sessions; and the said collectors of excise, clerks of the peace, and their deputies, or such of them as shall fail therein, shall, for every such offence forfeit five pounds, to be recovered by civil bill, before any of the judges of assize in their circuits, and in the county of *Dublin* before the justices of the peace at their quarter-sessions, and in the city of *Dublin* before the recorder of the said city, or the person appointed to hear civil bills in his absence, which penalties, when recovered, shall be to the use of the persons who shall without fraud sue for and recover the same. *f. 96.*

This act is continued, for two years, &c. from the 24th of June, 1764, by Stat. 3 Geo. 3. cap. 21. sect. 1.

Alehouses.

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5. *Stat. 3. Geo. 3. cap. 1. sect. 15.* No licence shall be granted for the retailing of beer, ale, wine, cyder, or other liquors within any goal, prison, house of correction, work-house, or house of entertainment for any parish poor, and all licences granted, or to be granted, contrary to this provision, shall be void. Prisons, work-houses, &c.

IV. Innkeepers obliged to receive guests.

If one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same; he is not only liable to render damages for the injury, in an action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the king. *1 Haw. 225.* Refusing to receive guests.

Also it is said, that he may be compelled by the constable of the town, or by a justice of the peace, to receive and entertain such a person as his guest; and that it is no way material whether he have a sign before his door or not, if he make it his common business to entertain passengers. But how the officer may compel him may be a question: It seemeth that all the officer can do, is either to cause such alehousekeeper to be suppressed, or else to present such offence at the assises or sessions, that so such offender may be thereupon indicted. *Dalt. c. 7.*

V. Concerning ale vessels, and the measure of ale.

1. No man shall sell wine, ale, nor any other liquor within any city or town franchised, unless it be with the King's measures sealed, that is to say, the gallon, the pottle, the quart, the pint, or the half-pint; *Eng. Stat. 28. H. 6. sess. 2. cap. 3.* Sealed measures.

2. An indictment will lie for selling ale in pots unsealed, altho' the statute appoints another method of proceeding; because measures are by the common law, and the statutes only direct the manner of ascertaining them. *Black. 10.*

But in such case, the indictment must not be upon the statute, but at the common law; and the offence ought to be laid, not for selling in pots unsealed, but in pots wanting measure. Pots wanting measure.

3. If any publick brewer shall sell or expose to sale, any beer, ale, or small-beer, in any half-barrel in guage under twenty gallons, or in any whole barrel in gauge under forty gallons, each gallon containing two hundred and seventeen cubical inches and six tenths of an inch, or shall not brand their christian name and fir-mame at length on the head of each barrel or half-barrel, every such publick brewer being thereof convicted, either upon his own confession or by the oath of one credible witness, before any chief magistrate or justice of the peace of any town corporate or county where the said offence shall be committed, shall forfeit for every barrel or half-barrel under the guage or not branded two shillings and six pence, and such barrel or half-barrel shall be burnt by order of such chief magistrate or justice before whom such conviction shall be, and such chief magistrate or justice shall by warrant under their hands and seals, Gauge of ale barrels.

Warrant of
distress.

seals, cause such penalties as the offenders are hereby liable to, to be levied by distress and sale of the offenders goods, and thereout pay the said penalties to the informers, and render the overplus, after deduction of the reasonable charges not exceeding two shillings of taking the distress, to the owners. *Stat. 9 Geo 2. cap. 9. sect. 1.*

Coopers selling
vessels under
guage.

4. If any cooper shall sell to any publick brewer, any barrels or half-barrels under the guages aforesaid, or shall not brand his christian-name and fir-name at length upon the head of every such barrel and half-barrel, every such cooper shall for every barrel or half-barrel so sold under the guage or not branded as aforesaid, forfeit two shillings and six pence, to be recovered, levied, and applied, as the penalties before-mentioned are directed to be levied and applied. *Ibid. sect. 2.*

Information in
six days.

5. No person shall be liable to incur the penalties inflicted by this act, unless information be given upon oath before such chief magistrate or justice of the peace, within six days next after such offence committed. *Ibid. sect. 3.*

VI. Concerning drunkenness.

Drunkenness
no excuse.

1. Drunkenness excuseth no crime; but he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober. 1. *Haw. 2.*

Spiritual cen-
sure.

2. If any offend their brethren by drunkenness, the churchwardens and sidemen shall present the same to the ordinary, that he may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed. *Can. 61.*

VII. Detaining goods for the reckoning.

General power
of detaining.

1. An innkeeper may detain the person of the guest who eats, or the horse which eats, till payment. And this he may do, without any agreement for that purpose. For men that get their livelihood by entertainment of others, cannot annex such disobliging conditions, that they shall retain the party's property in case of non-payment; nor make such disadvantageous and impudent a supposition, that they shall not be paid. And therefore the law annexes such a condition, without the exprefs agreement of the parties. *Bac. Abr. Inns. D.*

For it would be hard to oblige him to sue for every little debt; and a greater hardship, that he might not be able to find him who was his guest. *Id.*

Horse to be de-
tained only for
his own meat.

2 But an horse committed to an innkeeper, may be detained only for his own meat, and not for the meat of the guest, or of any other horse; for the chattels in such case are only in the custody of the law for the debt that arises from the thing itself, and not for any other debt due from the same party; for the law is open for all such debts, and doth not admit private persons to take reprisals. *Bac. Abr. Inns. D. 1 Bulst. 207.*

4. In like manner, if the innkeeper give credit to the party for that time,
and

and lets him go without payment; then he hath waived the benefit of the custom, and must rely on his other agreement. 8 Mod. 172. Goods suffered to be taken away, not to be retaken.

5. An innkeeper that detains a horse for his meat, cannot use him; because he detains him as in custody of the law; and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer.. Bac. Abr. Inns. D. Goods seized, not to be used.

6. But by the custom of *London* and of *Exeter*, if a man commit an horse to an innkeeper, and he eat out his price; the innkeeper may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffick with strangers, that could not be known to charge them with the action. But the innkeeper hath no power to sell the horse, by the general custom of the realm. Bac. Abr. Inns. D. Whether they may be sold.

So in the case of *Jones and Pearle, E. 9 G.* In trover for three horses, the defendant pleaded that he kept a publick inn at *Glastenbury*, and that the plaintiff was a carrier, and used to set up his horses there; and 36 l. being due to him for keeping the horses, which was more than they were worth, he detained and sold them, as well he might: but on demurrer judgment was given for the plaintiff; an innkeeper having no power to sell horses, except by special custom, as in the city of *London*. And besides, when the horses had been once out, the power of detaining them for what was due before, did not subsist at their coming in again. Str. 557.

VIII. Goods of a guest stolen out of an inn.

1. Inns were allowed for the benefit of travellers, who have certain privileges whilst they are in their journeys, and are in a more peculiar manner protected by the law: It is for this reason, that the innkeeper shall answer for those things which are stolen within the inn, tho' not delivered to him to keep, and tho' he was not acquainted that the guests brought the goods to the inn; for it shall be intended to be thro' his negligence, or occasioned by the fault of him or his servants. 8 Co. Caley's case. Innkeeper answerable for goods stolen.

In like manner, if an innkeeper bids his guest take the key of his chamber and lock the door, and tells him that he will not take the charge of the goods; yet if they are stolen, he shall be answerable: because he is charged by law for all things which come to his inn; and he cannot discharge himself by such or the like words. Dalt. c. 56. Black. 169.

2. Every hostler, innholder, or others, who shall take upon them the charge and keeping of horses, geldings, or mares in stables or out-grounds, shall be answerable for such horses, &c. which shall be delivered to them to be kept. Stat. 14 & 15 Car. 2. cap. 3. Hostlers to answer for horses.

3. *Holt, C. J.* doubted whether a man is a guest by setting up his horse at an inn, tho' he never went into the inn himself; but the other three justices held, that such person is a guest by leaving his horse, as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain; otherwise if he had left a trunk, or a dead thing. 1 Salk. 388. Who shall be deemed a guest in this respect.

So, if a man comes to an inn with a hamper, in which he hath certain goods (to wit, hats, as the case was), and departs leaving it with the host, and two days Leaving goods with the host.

Alehouses.

days after comes again, whereas in the time of his absence this was stolen; he shall not have any action against the host, because he was not a guest at the time of the stealing, and the host had no benefit by the keeping thereof, and therefore shall not be charged for the loss thereof in his absence. 1 *Roll's Abr.* 2.

Hiring a chamber.

If an attorney hires a chamber in an inn for a whole term, the host is not chargeable with any robbery in it, because the party is as it were a lessee. *Mo.* 877.

Lodging in an inn.

If one comes to an inn, and makes a previous contract for lodging for a set time, and doth not eat or drink there; he is no guest, but a lodger, and so not under the innkeeper's protection: but if he eats and drinks, or pays for his diet there, it is otherwise. 12 *Mod.* 255.

Soldiers billeted are guests.

Soldiers billeted are guests. *Clayt.* 97.

IX. Guests stealing goods.

A guest in a common inn, arising in the night time, and carrying goods out of his chamber into another room, and from thence to the stable intending to ride away with them, is guilty of felony, altho' there was no trespass in the taking of them (which yet is generally required in cases of felony.) *Dalt. c.* 40.

Appeals.

Appeal, what,

1. **T**HIS word has two significations in law; the one is, removing a cause from an inferior court or judge, to a superior; as from one or more justices, to the quarter-sessions.

The other kind of appeal (which is the subject of this title) is a prosecution against a supposed offender, by the party's own private action; prosecuting also for the crown, in respect of the offence against the publick. 2 *Haw.* 155.

In what cases an appeal may be brought.

2. An appeal is brought in three cases; 1. By a man for a wrong to his ancestor. 2. By a wife for the death of her husband. 3. For wrong done to the appellants themselves, as in the case of robbery, rape, or maihem; but this last is disused, on account of the nicety of the pleadings, and the charge of the prosecution; and the method of indictment is now generally taken. *Wood b.* 4. c. 5.

Within what time an appeal may be brought.

3. A person acquitted on an indictment of murder, shall not be set at liberty, but shall be recommitted, or bailed till the year and day be past; within which time an appeal may be brought. *Eng. stat.* 3 *H.* 7. c. 1.

Appeal brought before the sheriff and coroner.

4. It is certain, that an appeal may be commenced before the sheriff and coroner, and removed from them into the king's bench by certiorari. 2 *Haw.* 156.

Appeal brought before justices of the peace.

5. And it seems to be holden in *Fitzherbert's* abridgment, that justices of the peace have power to receive appeals; but there is much greater authority for the contrary opinion. 2 *Haw.* 156.

6. If

Apprentices.

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6. If the person appealed shall be acquitted, the appellor shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the King. 13 Ed. 1. st. 1. c. 12. That is, if the appeal shall appear to the court to have been malicious. 2 Haw. 198. Person acquitted on appeal.

7. Forasmuch as an appeal is the suit of the party, as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment; for in such case he can only pardon for himself, but not for the party. 2 Haw. 155. The King can't pardon on an appeal.

Apprentices.

I. Who may take apprentices.

II. Binding of apprentices.

III. Differences between the master and apprentice.

IV. Apprentice stealing his master's goods.

V. Inticing away an apprentice.

VI. Assigning apprentices.

VII. Master dying.

VIII. Apprentices setting up their trades.

I. Who may take apprentices.

1. An alien artificer shall not take any apprentice or servant to work with him, unless it be his son or daughter, or else a subject born, on pain to forfeit twenty pounds. Eng. stat. 1. Rich. 3. cap. 9. sect. 11. Aliens.

2. No stranger born out of the king's obeisance using any trade, manufactory, or occupation, and inhabiting within any of the cities, boroughs and liberties thereof, shall at any one time retain and keep in their services, any apprentices or journeymen, or covenant servants above the number of six besides their sons or daughters, who are all to be protestants or else protestant subjects and born under his obeisance, upon pain to loose their freedom, &c. Stat. 14 & 15 Car. 2. cap. 13. sect. 6. Strangers may take six.

This act, as far as it concerns the encouraging protestant strangers, is revived and made perpetual by Stat. 4 Geo. 1. cap. 9.

3. No person making locks or barrels for fire-arms, or making swords, knives, or other weapons, shall take to prentice, or receive or instruct as an apprentice, any person of the popish religion, on pain that every person so offending shall for every such offence forfeit twenty pounds, to be recovered by bill, &c. in any court of record, one moiety to be to his Majesty, and the other to the informer, or them that shall sue for the same. Stat. 7 Will. 3. cap. 5. sect. 7. Gunsmith's, &c. taking papists.

Apprentices.

Indentures
void.

4. The indenture of apprenticeship, and all bonds and contracts to be made by reason of any such popish person being put to be an apprentice as aforesaid, shall be void, and every such person of the popish religion who shall be put to be an apprentice contrary to this act, and who shall exercise the said art, shall for every such offence forfeit twenty pounds, to be sued for and recovered as aforesaid to the uses before mentioned, and the justices of the peace, and head officers of cities and towns corporate are required to send for all apprentices of such persons exercising the art aforesaid whom they shall suspect, and shall tender to them the oaths and declaration *which are prescribed by Eng. stat. 3 & 4 Will. & Mar. cap. 2.* to be by them taken and subscribed, and the refusal of such persons to take the said oaths or subscribe the said declaration, shall be a conviction of his being guilty, as also of the master of such apprentice, unless such master shall prove that such apprentice at the time of entering his service was known or reputed to be of the protestant religion. *Sett. 8.*

Refusal to take
the oaths.

Attornies, &c.
taking papists.

5. No attorney, fix-clerk, solicitor, officer or deputy officer in any of the courts aforesaid, shall presume to take, keep, or have any papist or reputed papist to be his apprentice or clerk. *Stat. 6 Ann. cap. 6. sect. 6.*

Papists to take
but two at a
time.

6. No papists who shall be permitted to follow any trade, shall hereafter take or keep more than two apprentices at a time in any such trade, except the hempen or flaxen manufacture, and that for no less a term of apprenticeship than seven years, and whatever papist shall offend therein, shall forfeit one hundred pounds for every such offence, to be recovered by such person who shall sue for the same, in such manner as the several forfeitures exceeding the sum of ten pounds herein before mentioned are to be recovered. *Stat. 8 Ann. cap. 3. sect. 38.*

II. Binding of apprentices.

Binding to be
by deed.
And by the
name of an ap-
prentice.
Infant bound,
tho' underage.

1. One cannot be bound an apprentice without deed. *1 Salk. 68.*
2. And an apprentice must be retained by the name of an apprentice expressly, otherwise he is no apprentice, tho' he be bound. *Dalt. c. 58.*
3. It seems clearly agreed, that by the common law infants, or persons under the age of 21 years, cannot bind themselves apprentices, in such a manner as to intitle their masters to an action of covenant, or other action, for departing their service, or other breaches of their indentures: which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices according to the terms agreed on. *Bac. Abr. master and servant. B.*

The father co-
venanting for
an infant.

But if his father, or other person, doth covenant for him, such covenant shall bind the father, or such other person: as in the case of *Whitley and Loftus, M. 10 G. 2.* In the indenture of apprenticeship, the father covenants to pay the apprenticeship money; the son covenants to account for his master's goods; and in the conclusion, the father and son each bind themselves for the true performance of all covenants and agreements therein. By the court: The end of binding the father was to answer wrongs done by the son, and he must answer for any; and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be

be taken distributively, to wit, that each of the covenantors should perform his part; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. 8 *Mod.* 190.

But a covenant between the master and a third person, the infant not being party, maketh not an apprenticeship. 2 *Salk.* 479.

4. The minister and church-wardens of every parish within this kingdom, may bind out with the consent and approbation of one justice of the peace for the county where such parish shall lie, any child they find begging within their parish, or any other poor child within the parish, with the consent of the father if living, or of the mother if the father be dead, to any honest and substantial protestant house-keeper, or protestant tradesman, that will entertain such child as a menial servant, till such child arrives to the age of one and twenty, or to any credible trades-man as an apprentice to his trade, till such apprentice be twenty-four years old compleat. *Stat. 2 Geo. 1. cap. 17. sect. 12.*

Binding poor children.

5. The age of every child thus bound out as a menial servant, or as an apprentice, shall be ascertained in the indentures by which the child is bound out, and the age fixed by such indenture, shall in all controversies that may arise betwixt such apprentice and their respective masters and mistresses, be taken for the true age of such child, and an exemplification of such indentures which shall be always entered in the vestry book of the parish where any such child shall be bound out, being signed and sealed by the minister and church-wardens, shall in all controversies be as authentick as a counter-part of the said indentures. *Sect. 13.*

Age of the children.

6. Covenants usually inserted in favour of servants in other indentures of apprenticeship, shall be inserted in the said indentures. *sect. 15.*

Usual covenants.

7. *Stat. 23 Geo. 2. cap. 11. sect. 1.* It shall be lawful for the incorporate society for promoting *English protestant Schools*, under their seals to appoint such persons as they shall think proper in every province, to take up all children they shall find begging, or led about by any vagrant begging person, who shall appear to them to be under the age of twelve years, and above the age of five years.

Incorporate Society.

8. It shall be lawful for the said society, or any three of the committee of fifteen, to send such children to be educated in any charter school, and when of proper age to bind out them to any protestant, till such child arrives at the age of one and twenty years, or as an apprentice to any creditable protestant trades-man, till such apprentice be twenty-four years old compleat. *sect. 2.*

Children in the charter-schools

9. The age of every child so bound out as a menial servant, or as an apprentice, shall be ascertained in the indentures by which the child is bound out, and the age fixed by such indenture, shall, in all controversies that may arise between such servant or apprentice and their respective masters and mistresses, be taken for the true age of such child, and an exemplification of such indentures, which shall be always entered in a book of the said society to be kept for that purpose, and signed by the said committee of fifteen, or any three of them, shall in all controversies relating thereto, be as authentick as a counterpart of the said indenture. *sect. 3.*

Age ascertained.

Exemplification of indentures.

III. Differences between the master and apprentice.

Master may
chastise his ap-
prentice.
Whether the
master himself
can discharge
his apprentice.

1. The master is allowed by law, with moderation, to chastise his apprentice. *Dalt. c. 58.*

2. An apprentice being by deed, cannot be discharged but by deed: but the master and apprentice may, by agreement between themselves, leave each other; and if so, then the master may give leave under his hand for the apprentice to depart; and then one justice out of sessions may discharge him, allowing the cause of his departure. *Dalt. c. 58. 6 Mod. 182.*

But it seemeth that this shall not extend to parish apprentices, for that there the minister and church-wardens are parties to the contract, which cannot therefore be avoided by any agreement between the master and his apprentice.

Differences be-
tween the mas-
ter and appren-
tice.

3. *Stat. 2 Geo. 1. cap. 17. sect. 15.* Any of his majesty's justices of the peace for the county where such children live, may on complaint of ill usage or cruel treatment, examine into the behaviour of the master or mistress complained of, and in case the complaint appear groundless, such justice of the peace shall have power to order reasonable correction for such servant or apprentice complaining without cause; but if immoderate severity or cruel usage be fully proved against the master or mistress, such justice is required to discharge such servant or apprentice from serving the said master or mistress, and to bind him or her apprentice to some other master or mistress for the remainder of the time.

Complaints of
apprentices.

5. It may be lawful for any two justices of the peace, to hear and determine all complaints of apprentices employed in any handy-craft trade or manufacture, and to remove such apprentice if they shall find just cause for so doing, from such service, by order under their hands and seals, and by the like order to turn over such apprentices to some other master or mistress of the same trade, for the remainder of the term of such apprenticeship. *sect. 20.*

Appeal to the
sessions.

6. If any such master or mistress shall find him or herself aggrieved by such order, it shall be lawful to appeal to the justices at the next general quarter-sessions, to be held in such county, or county of a city or town, which justices are to determine the same, and their order on such appeal to be final to all parties. *sect. 21.*

Misusage of ap-
prentices.

7. It shall be lawful for any two justices, upon application by any apprentice upon whose binding out no larger sum than five pounds was paid, concerning any misusage, refusal of necessary provision, cruelty, or other ill treatment of such apprentice, by his or her master or mistress, to summon such master or mistress to appear, at a reasonable time to be named in such summons; and such justices shall examine into the matter of complaint, and upon proof thereof made upon oath to their satisfaction, whether the master or mistress be present or not, if service of the summons be also upon oath proved, the said justices may discharge such apprentice by warrant or certificate under their hands and seals, for which no fees shall be paid. *Stat. 25. Geo. 2. cap. 8. sect. 3.*

Discharge by
warrant.

8. And

Apprentices.

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8. And it shall be lawful for such *justices*, upon application or complaint made upon oath by any master or mistress against any such apprentice, touching any misdemeanor, miscarriage or ill-behaviour in his or her service, to hear, examine and determine the same and to punish the offender by commitment to the house of correction, there to be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by discharging such apprentice. *sect. 4.* Complaints by masters.

9. If any person shall think themselves aggrieved by such determination, order or warrant of such *justices*, save and except any order of commitment, they may appeal to the next quarter-sessions to be held for the county or place where such determination or order shall be made; which general quarter-sessions is impowered to hear and finally determine the same, and to award such costs to any of the respective persons appellant or respondent, as the said sessions shall adjudge reasonable, not exceeding five pounds, the same to be levied by distress and sale, *of the goods of the party.* *sect. 5.* Appeal. Costs.

10. No writ of *Certiorari* or other process shall issue, to remove any proceedings had in pursuance of this act, in any of his Majesty's courts of record at *Dublin.* *sect. 6.* No *Certiorari*.

This act, with the several amendments thereto made by stat. 29 Geo. 2. cap. 8. sect. 13. are by stat. 1 Geo. 3. cap. 17. sect. 32. continued for four years from the end of that session of parliament, and to the end of the then next session.

11. *Stat. 29 Geo. 2. cap. 8. sect. 13.* The complaints, differences and disputes, which by the act 25 *Geo. 2. cap. 8.* are directed to be heard and determined by two or more such justices of the peace, as in the said act are described, shall be heard and determined by one such justice; which one justice is impowered to make such orders, and do all such other acts as two or more such justices are impowered by the said act to make or do, with like liberty of appeal from the determination, order or warrant of such one justice, as by the said act is provided, from the determination of two or more such justices: and the said act, with the alterations and amendments herein contained, shall be continued to the 25th day of *March, 1760, &c.* One justice.

12. By the act 23 *Geo. 2. cap. 11.* If any child bound out by the incorporate society for promoting *English protestant Schools*, shall withdraw without licence of the master or mistress, or behave disorderly, such child or apprentice shall be punished in such manner as hired servants departing their masters service, within the time for which they were hired, are liable to be punished by the act of the second of King *George the first.* *Ibid. sect. 4.* Apprentice withdrawing.

13. Provided that if any party shall think him or herself aggrieved by any thing which shall be done in pursuance of this act, he or she may appeal to the next quarter-sessions of the peace for the county, or the county of the city or town, where the party complained of in such appeal shall reside, notice of which appeal shall be given in writing to the other party fourteen days before such quarter-sessions, and the respective justices of the peace, Appeal to the sessions.
or

Apprentices.

Indictment for
misdemeanor.

or the greater part of them, who shall hold such quarter-sessions, are required to determine the matter of such appeal, and to give under their hands and seals a certificate, signifying what their determination is, which shall be conclusive to all parties, and all persons concerned are required, upon such certificate's being produced to them, immediately to obey such determination; and if any person shall neglect or refuse so to do, they may be indicted at some following quarter-sessions, to be held as aforesaid, as for a misdemeanor, and punished if found guilty, as persons guilty of misdemeanors may now be punished. *Ibid. sect. 5.*

14. In case there be no sufficient time to give the said fourteen days notice, the said appeal shall be made to the second quarter-sessions on giving the like notice. *Ibid. sect. 6.*

Unkind usage.

An apprentice was discharged, the master having *used him unkindly*, and refusing to provide for and entertain him: But this is not a good ground for the discharge; for there is a power to oblige the master to receive and entertain the apprentice, and *using him unkindly* is too loose. *Str. 1014.*

Sickness no
cause of dis-
charge.

15. An apprentice being lame, and having the king's evil, and in the opinion of surgeons incurable; therefore the justices discharge the master from his apprentice, because the master cannot now have the end of the binding, which was, the service of his apprentice. But the statute only impowers the justices to discharge for misbehaviour, and not for sickness; for the master takes the apprentice for better and worse, and is to provide for him in sickness and in health. *Str. 99.*

Master must be
summoned.

H. 5 G. K. and Gill. An order of sessions for discharging an apprentice was quashed, because it did not set forth, that the master was summoned, or did appear. *Sta. 143. 1013.*

Master may be
discharged.

16. As the justices may discharge the apprentice from his master, for ill usage; so also they may discharge the master from the apprentice, for evil and disorderly behaviour. *Read. Appr.*

V. Apprentice stealing his master's goods.

Stealing the
master's goods.

1. *Stat. 33 Hen. 8. sess. 1. cap. 5. sect. 1.* Servants to whom any caskets, jewels, money, goods or cattalls by their masters shall be delivered to keep, that withdraw and go away with the said money, &c. to the intent to steal the same and defraud their masters thereof, contrary to the trust to them put; or else being in the service of his said master, without assent or commandment of his master, imbezel the same, or otherwise convert the same to his own use with like purpose to steal it, if the said goods, &c. that any such servant shall go away with or imbezel, with purpose to steal it, be of the value of forty shillings, the same shall be adjudged felony.

Felony.

Apprentices
under eighteen
years.

2. Provided that this act shall not extend to apprentices, nor to any person within the age of eighteen years, going away with his master's goods, or otherwise converting the same to their own uses, during the time of their apprenticeship, or being within the age of eighteen years. *Ibid. sect. 2.*

But

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But if they be eighteen years of age, they shall be guilty as other persons.

3. *Stat. 2 Geo. 1. cap. 17. sect. 23.* If any person be found guilty of any of the offences in the said statute, 33 *Hen. 8.* or shall stand mute or challenge peremptorily above twenty, they shall suffer death as in cases of felony, without benefit of clergy. Clergy taken away.

VI. Inticing away an apprentice.

1. The inticing of an apprentice to depart from his master, is not an offence of a publick nature, for which an indictment will lie; but the party's remedy is by an action on the case, which he may well maintain. 6 *Mod.* 182. *Q. and Daniel.* Indistable offence.

2. *Stat. 2 Geo. 1. cap. 17. sect. 16.* If any person bound out as an apprentice or servant, pursuant to this act, shall depart their service without their consent, unless such apprentice hath been discharged pursuant to this act, such servant or apprentice shall be punished in like manner as hired servants departing their service within the time for which they hired themselves, are liable to be punished by this act. Departing without discharge.

3. Any person *who* shall entertain any such apprentice, bound out as aforesaid, either as a household servant, or as an apprentice or journeyman at his trade, before his time of service be expired, unless he has the consent of the person to whom he was bound, or have a regular discharge from his former service, given him by some justice of the peace, upon full proof of ill usage from his former master or mistress, shall forfeit forty pounds, to be recovered by the person having a right to the service of such apprentice. *Ibid. sect. 17.* Entertaining the apprentice of another.

4. *Stat. 23 Geo. 2. cap. 11. sect. 7.* If any person shall seduce or intice to run away, or shall forcibly carry away, or attempt to carry away, any child placed, or going to be placed in any of the said charter or charity schools, or from their services or apprenticeships, or shall harbour, conceal or entertain any such child knowingly, the person so offending, being thereof convicted, shall be committed to the house of correction for six months, there to be employed in hard labour. Seducing or carrying away charter-school apprentices.

VII. Assigning apprentices. (I.)

E. 3 G. K. and Barnes. Order returned on a certiorari: It is resolved by the justices at the sessions, where a person was bound an apprentice to *Barnes* by the parish officers, and *Barnes* had assigned him to another, that the assignment is void, and they direct *Barnes* to take his apprentice again. But by the court, The sessions had no power to judge of the validity of a deed, or to hinder a man from assigning his apprentice. The covenant to provide for him is well performed, if the person to whom he is bound assigns him to another to provide for him. Wherefore the order was quashed. *Foley 155. Str. 48.* Assigning an apprentice.

For

Apprentices.

Assignee must
provide for
him.

For the jurisdiction of the justices extends no farther than to compel the master to take care of his apprentice: but in what manner he does it, whether in his own house or otherwise, is nothing to them. But if the assignee of the apprentice doth not provide for him, the first master may be compelled to do it, and he may take his remedy over. *Seff. C. V. 1. 110.*

VIII. Master dying.

Master dying.

It hath been said, that if the master dies, the apprentice goes to the executor or administrator to be maintained, if there are assets; but the executor or administrator may bind him to another master for the remaining part of his time.

Personal trust.

And in *M. 10 W. K. and Peck. Eyre J.* held, that an apprenticeship is a personal trust between the master and servant, and determines by the death of either of them; and by the death of either of them, the end and design of the apprenticeship cannot be obtained, and it may be the executor is of another trade; he admitted, covenant would lie against the executor, but in that there is no inconvenience, because the executor may make his defence by pleading no assets, or debts of a higher nature. *Holt Ch. J.* said, that by the custom of *London*, the executor shall put the apprentice to another master of the same trade; and that in other places, it would be very hard to construe the death of the master to be a discharge of the covenants; he said, it had been held, that the covenant for instruction failed, but that he still continues an apprentice with the executor, as to maintenance. *1 Salk. 66.*

Executor of
the master.

By the act, 2 *Geo. 1. cap. 17. sect. 14.* On the death of the master, to whom a child is bound apprentice by the minister and church-wardens, his executors or administrators shall have a right to the labour of such apprentice for the remainder of the term, during which he was by his indenture obliged to serve.

IX. Apprentices setting up their trades.

Setting up a
trade.

By the common law, no man may be prohibited to work in any lawful trade or in more trades than one, at his pleasure. *11 Co. 53.*

No restraint
without a law.

So that without an act of parliament no man may be restrained, either to work in any lawful trade, or to use divers misteries or trades; therefore an act of parliament made to restrain any person herein, must be taken strictly, and not favourably as acts made in affirmance of the common law.

A. Indenture of a parish apprentice; on 2 *Geo. 1. cap. 17.*

THIS indenture made the—day of—in the year of our lord—
Between A. B. the minister, and C. D. and E. F. church-wardens of the
parish of—in the county of—of the one part, and A. M. of—in
the said parish, shoemaker, of the other part, witnesseth, that the said mini-
ster and church-wardens, by and with the consent and approbation of J. P. Esq;
one of his majesty's justices of the peace for the said county, have by these pre-
sents put, placed, and bound A. P. a poor boy (or girl) found begging in the said
parish,

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parish, (or whose father F. P. or if the father be dead, whose mother M. P. hath consented to his, or her, being bound apprentice) which said A. P. is now of the age of ——— years, to be an apprentice with him the said A. M. and as an apprentice with him the said A. M. to dwell, from the date of these presents, until the said A. P. shall come to the age of twenty-four years (or, if a female, until the said A. P. shall come to the age of twenty-one years, or the time of her marriage, which shall first happen) according to the statutes in such case made and provided. By and during all which time and term, the said A. P. shall the said A. M. his said master well and faithfully serve, in all such lawful business as the said A. P. shall be put unto by the command of his said master, according to the power, wit, and ability of him the said A. P. and honestly and obediently in all things shall behave himself towards his said master, and honestly and orderly towards the rest of the family of the said A. M. And the said A. M. for his part, for himself, his executors and administrators, doth hereby promise and covenant, to and with the said minister and church-wardens, for them and their successors, and for the said A. P. that he the said A. M. shall the said A. P. in the craft, mystery, and occupation of a shoemaker, which he the said A. M. now useth, after the best manner that he can or may, teach, instruct, and inform, or cause to be taught, instructed, and informed, as much as thereunto belongeth, or in any wise appertaineth. And that the said A. M. shall also find and allow unto the said apprentice sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice, during the term aforesaid. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

The Assent of a justice.

J. P. esquire, one of his majesty's justices of the peace in and for the said county of ——— do hereby declare my consent and approbation to the binding the abovenamed A. P. an apprentice to the abovenamed A. M. according to the form and effect of the abovementioned indenture. Given under my hand and seal the ——— day of ———

B. Complaint of an apprentice to one justice against his master ;

County of **T**HE information and complaint of A. P. apprentice to A. M. Dublin. of ——— in the said county, husbandman, taken and made [on oath, if he is above 14 years of age] before me one of his Majesty's justices of the peace in and for the said county, the ——— day of ——— in the year, &c.

Who saith, that he the said A. P. about a year and a half ago last past, became bound an apprentice by indenture to A. M. of ——— aforesaid, husbandman; that at several times, since he entered upon the said apprenticeship, the said A. M. hath misused and ill treated him the said apprentice, and particularly [as the case shall be].

Taken and signed the day and
year above ; before me

J. P.

E

A + P
his mark.

C.

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C. Summons of the master by one justice, on complaint of the apprentice.

County of Dublin. } To the constable of —

WHEREAS complaint hath been made unto me — one of his Majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of — in the said county, husbandman, that he the said A. M. hath misused and ill treated him the said A. P. and particularly [as the case shall be:] These are therefore to require you to summon the said A. M. to appear before me at — in the said county, on — the — day of — to answer unto the said complaint; and also that you give notice unto him, to bring with him the indenture of apprenticeship between him and his said apprentice; and also that you bring before me at the same time and place the said A. P. to make good the said complaint; and also that you bring with you this precept, and certify unto me then and there what you shall have done in the execution thereof. Given under my hand and seal the — day, &c.

D. Discharge of an apprentice by one justice, on the master's misusing him.

County of Dublin **W**HEREAS complaint hath been made before me — one of his Majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of — in the said county, taylor, that he the said A. M. hath misused and ill treated him the said apprentice [and particularly, as the case shall be]; And whereas the said A. M. hath appeared before me in pursuance of my summons to that purpose, but hath not cleared himself of and from the said accusation and complaint, but on the contrary the said A. P. hath made full proof of the truth thereof before me upon oath; I therefore by these presents do discharge him the said A. P. of and from his apprenticeship to the said A. M. any thing in the indenture of apprenticeship made betwixt them, or otherwise howsoever, to the contrary notwithstanding. Given under my hand and seal the — day of &c.

[Or, And whereas it hath been duly proved before me as well upon the oath of A. C. constable of — aforesaid, as otherwise, that he the said A. C. did duly summon the said A. M. to appear before me at a reasonable time in the said summons mentioned and specified; but notwithstanding the same, he the said A. M. hath not appeared before me according to such summons: I therefore having duly examined into the matter of the said complaint, and the truth thereof having been fully proved before me upon oath, do discharge, &c.]

E. Complaint to one justice of the master against his apprentice.

County of **T**HE complaint and information of A. M. of ——— in the
Dublin. said county, husbandman, taken on oath before me ——— one
of his Majesty's justices of the peace in and for the said county, the ——— day
of ———

*Who saith, that A. P. having been bound to him an apprentice by indenture
bearing date the ——— day, &c. and having entered upon his apprenticeship
accordingly, hath been refractory and disobedient to him the said A. M. [and
particularly as the case shall be.]*

Taken the day and year
above before me

A. M.

J. P.

F. Warrant for a disorderly apprentice, by one justice.

County of Dublin. } To the constable of ———

WHEREAS oath hath been made before me ——— one of his Majesty's
justices of the peace in and for the said county, by A. M. of ——— in
the said county husbandman, that A. P. apprentice to the said A. M. hath
committed divers misdemeanors against the said A. M. his master, and hath like-
wise run away from his said master; These are therefore to require you forth-
with to apprehend the said A. P. and bring him before me, to answer unto the
said complaint, and to be dealt with according to law: And you are to give notice
to the said A. M. that he appear before me at the same time, to make good the
said complaint. Given under my hand and seal, &c.

G. Commitment of an apprentice to the house of correction, on complaint of his master by one justice.

County of Dublin. } To the constable of ——— in the said county,
and to the keeper of the house of correction
at ——— in the said county.

WHEREAS complaint hath been made before me ——— one of his Ma-
jesty's justices of the peace in and for the said county, upon the oath of
A. M. of ——— in the said county, husbandman, that A. P. apprentice of the
said A. M. hath committed divers misdemeanors against him the said A. M. his
master, and particularly [as the case shall be]; And whereas upon examination
thereof, and upon hearing the allegations of both parties, having come before me
for that purpose, and upon due consideration had thereof, he the said A. P. is and
stands

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stands convicted before me of the said offence: I do therefore hereby command you the said constable, to take and convey the said A. P. to the said house of correction, and to deliver him to the said keeper thereof, together with this warrant: And I do hereby command you the said keeper of the said house of correction, to receive the said A. P. into your custody in the said house of correction, there to remain and be corrected, and held to hard labour for the space of ——— Given under my hand and seal the ——— day, &c.

H. Discharge of an apprentice by one justice, on complaint of the master.

County of **W**HEREAS complaint, &c. (as in the last precedent) —
 Dublin *I do therefore by these presents discharge the said A. P. from his apprenticeship to the said A. M. any thing in any indenture or indentures of apprenticeship betwixt them, or otherwise, to the contrary notwithstanding. Given, &c.*

I. Assignment of an apprentice.

TO all to whom these presents shall come: I A. M. of ——— send greeting.
Whereas my apprentice A. P. hath divers years yet to come and unexpired of his apprenticeship, to wit, ——— whole years from the ——— day of ——— now last past, as by his indenture of apprenticeship to me sealed doth appear; Now know ye, that I the said A. M. for divers good causes and considerations me hereunto moving, have given, granted, assigned, and set over, and by these presents do fully and absolutely give, grant, assign, and set over unto A. S. of ——— all such right, title, duty, term of years to come, service, and demand whatsoever, which I the said A. M. have in or to the said A. P. or which I may or ought to have in him by force and virtue of the said indenture of apprenticeship. And moreover, I the said A. M. do by these presents covenant, promise, and agree to and with the said A. S. his executors and administrators, that notwithstanding any thing by me the said A. M. to be done to the contrary, the said A. P. shall, during the said term of ——— years, well and truly serve the said A. S. as his master, and his commandments lawful and honest shall do, and from his service shall not absent himself during the said term. Provided, that the said A. S. shall well intreat and use him the said A. P. and him the said A. P. in the craft, mystery, and occupation of a ——— which he the said A. S. now useth, after the best manner that he can or may, shall teach, instruct, and inform, or cause to be taught, instructed and informed, as much as thereunto belongeth, or in any wise appertaineth, and shall also during the said term find and allow unto the said A. P. sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice. In witness, &c.

AN *approver* (probator) is a person indicted of treason or felony, and in prison for the same, who upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment. 3 *Inst.* 129. Approver.

This accusation of himself, and oath, makes his accusation of another person of the same crime, to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. 3 *Inst.* 129, 130. Accusation on oath.

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. 3 *Inst.* 130.

And besides, as it is in the discretion of the court, whether they will suffer one to be an approver, this method of late hath been seldom practised; and in many cases we have what seems to amount to the same, by statute; where pardon is assured to offenders, on discovering and convicting their accomplices. Pardon of offence.

Arraignment.

WHEN an offender comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the goaler of another prison; the first thing that follows thereupon, is his arraignment. 2. *H. H.* 216. Arraignment, what.

Now arraignment is nothing else but the calling the offender to the bar of the court, to answer the matter charged upon him. 2 *H. H.* 216.

And the word in latin (lord *Hale* saith is no other than *ad rationem ponere*, and in French *ad reson*, or abbreviated *a resn*; for as the antient word *disrain* or *derayn* imports in latin *disrationare*, to disprove or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *ad rationem ponere*, to call to account or answer. 2. *H. H.* 216. And this perhaps may be sufficient to shew the meaning of the word, altho' not to declare its derivation. Derivation.

The prisoner on his arraignment, tho' under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons. 2 *H. H.* 219. Without irons or shackles.

Also there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answers that he is the same person, it is all one. 2 *Hawk.* 308. Holding up his hand.

T H I S

THIS is to be understood of arrests in criminal cases only, and not in civil cases.

Arrest, what.

The word *arrest* is the same, with very little variation, in the English, French, German, Belgick, and other languages of the western Empire, heretofore subject to the Roman power; and probably may have been derived unto us thro' the channels both of France and Saxony: the French *arrester* signifieth to stop or stay; and the Saxon *restan*, to rest; and both perhaps have sprung from the Italian *arresto*, and that from the well known latin verb *sto*, to stand.

And, in law, an arrest doth signify the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of imprisonment.

Lamb. 93.

Concerning which I will shew.

I. Who may or may not be arrested.

II. For what causes of suspicion an arrest may be.

III. By whom the arrest shall be made.

IV. The manner of an arrest.

V. What is to be done after the arrest.

I. Who may or may not be arrested.

Privilege of parliament.

1. Generally, a member of parliament shall have the privilege of parliament for himself and his servants to be freed from arrests: but for treason, felony, and breach of the Peace, there can be no privilege. 4 *Inst.* 24, 25.

Peers and bodies corporate

2. In cases of peers and corporations, the process is a *distringas*, for they cannot be arrested. 3 *Salk.* 46.

In church-yards.

3. None shall arrest priests or their clerks, or other persons of holy church, whilst they attend to divine service, in churches, church-yards, or other places dedicated to God; on pain of imprisonment and ransom at the king's will, and he shall also make gree to the parties arrested. 50 *Ed.* 3. c. 5.

1 *R.* 2. c. 15.

On fundays.

4. Also a warrant executed against any person whatsoever, on the lord's day, is void; and the persons serving the same shall suffer damages, as if they had done the same without warrant, except in cases of treason, felony, and breach of the peace. 7 *Wil.* 3. c. 17.

II. For what causes of suspicion an arrest may be.

Suspicion.

By the *Eng. stat.* 34 *Ed.* 3. c. 1. Power is given to the justices of the peace, to arrest all those, whom they find by indictment, or by *suspicion*, and to put them in prison.

And

And the causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are these that follow : Causes of suspicion.

(1.) The common fame of the country; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. *2 Haw. 76.* Common fame.

(2) The being found in such circumstances, as induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming nonestly by them. *2 Haw. 76.* Circumstances of guilt.

(3) The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. *2 Haw. 76.* Flight.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him. *2 Haw. 122.*

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. *2 Haw. 76. 2 Inst. 52.* Evil company.

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. *2 Haw. 76.* Living idle.

(6) The being pursued by hue and cry. *2 Haw. 76.* Hue and cry.

For if a Felony is done, and one is pursued upon hue cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be attached and imprisoned by the law of the land. *2 Inst. 52.*

But generally, no such cause of suspicion, as any of the abovementioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry. *2 Haw. 76.* Where no crime is committed.

III. By whom the arrest shall be made.

1. In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept. Arrest without warrant.

2. Thus all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect. *2 Haw. 74.* By private persons.

Also, every private person is bound to assist an officer demanding his help, for the taking of a felon, or the suppressing of an affray. *2 Haw. 75.*

Also by the act of 19 Geo. 2. cap. 21. sect. 11. every inhabitant within the city or suburbs of *Dublin* or the liberties thereto adjoining, calling to his or her assistance the beadle of the parish, or a constable shall have authority to apprehend and bring before any one of the governors of the work-house or any one of His Majesty's justices of the peace of the said city, any sturdy beggar or other idle vagabond, that such beadle or bell-hour, constable, or inhabitant shall find, or be informed of, to be begging, strolling, or frequenting any of the streets or houses within the said city or suburbs or the liberties thereunto adjoining. By beadles.

3. Also

- By watchmen. 3. Also, a watchman may arrest a night walker, without any warrant from a magistrate. 2 *Inst.* 52.
- By constables. 4. In like manner, a constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 *H. H.* 587.
- By any person whatsoever. 5. Or any person whatsoever, if an affray be made to the breach of the king's peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.
- Arrest with warrant: 6. So much concerning an arrest without a warrant; next follows arresting with such warrant.
- By the sheriff or constable. 7. The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it. 1 *H. H.* 581.
- Sheriff may depute. 8. If it be directed to the sheriff, he may command his bailiff, under-sheriff, or other sworn and known officer, to serve it, without writing any precept. But if he will command another man, that is no such officer, to serve it, he must give him a written precept, otherwise, false imprisonment will lie. *Lamb.* 89.
- Others cannot depute. 9. But every other person, to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him. 2 *Haw.* 86.
- Where a constable may execute it out of his own district. 10. If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another: but if it be directed to a particular constable (Mr. *Hawkins* says, to a particular constable *by name*), he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. *Lord Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.
- Any person may execute. 11. The justice that issues the warrant, may direct it to a private person if he pleaseth, and it is good; but he is not compellable to execute it unless he be a proper officer. 1 *H. H.* 581.
- But not to be directed to the party. 12. But by the justices oath, the warrant ought not to be directed to the party, but to some indifferent person, to execute it.
- Where directed to two jointly. 13. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169.

IV. The manner of an arrest.

- To be gone about immediately. 1. The officer to whom a warrant is directed and delivered, ought with all speed and secrecy to find out the party, and then to execute the warrant. *Dalt. c.* 169.
- Opposing the execution. 2. It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason or felony: And it seems, that the person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessory to the felony. 2 *Haw.* 121.

Arrest.

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3. An arrest in the night is good, both at the suit of the king and of the subject; else the party may escape. 9 Co. 66. Arresting in the night.

4. In *England* by the 24 Geo. 2. c. 55. Constables and others may, on having the warrant indorsed by a justice in another county, into which an offender shall have escaped, arrest an offender in such other county, and carry him before a justice in such other county, if the offence is bailable, to find bail; or else shall carry him back again before a justice in the county from whence the warrant did first issue. Arresting in another county.

5. A private person cannot raise power to arrest or detain a felon. 1 H. 601. Taking the power of the county.

But any justice, or the sheriff, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons; or such as do break, or go about to break, or disturb the king's peace: and every man being required, ought to assist and aid them, on pain of fine and imprisonment. *Dalt. c. 171.*

But it is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. *Dalt. c. 171.* But not without just cause.

But where a justice, sheriff, or other officer, is enabled to take the power of the county, it seemeth they may command, and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other persons being above the age of fifteen years, and able to travel. *Dalt. c. 171.* Because by the statute of *Winchester*, all of that age are bound to have harness.

But women, ecclesiastical persons, and such as be decrepit, or diseased, shall not be compelled to attend them. *Dalt. c. 171.*

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them, and how and after what manner they shall be armed or otherwise furnished. *Dalt. 171.*

6. As to the case of breaking open doors, in order to apprehend offenders, it is to be observed that the law doth never allow of such extremities but in cases of necessity; and therefore, that no one can justify the breaking open another's doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. Breaking open doors.
2 Haw. 86.

But where a person authorized to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors in the following instances:

(1) Upon a *capias* grounded on an indictment for any crime whatsoever; Upon a *capias*, or upon any *capias* from the chancery or king's bench, to compel a man to find sureties for the peace or good behaviour. 2 Haw. 86.

(2) Where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person; but where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him: (And this opinion he founds on *Coke's 4 Inst. 177.* and *Hale's pleas of the crown, 91.*) 2 Haw. 87. Treason or felony.

F

But

Probable suspicion.

But lord *Hale*, in his history of the pleas of the crown, says, that upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained, notwithstanding the contrary opinion of lord *Coke*: for in such case the process is for the king, and therefore a *non omittas* is implied. 1 *H. H.* 580, 583. 2 *H. H.* 117.

And as he may break open such person's own house, so much more may he break open the house of another to take him; for so the sheriff may do upon a civil process: But then he must at his peril see that the felon be there; for if the felon be not there, he is a trespasser to the stranger whose house it is. 2 *H. H.* 117.

But it seems that he that arrests as a *private man* barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, that is, if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 *H. H.* 82.

But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it; and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint. 2 *H. H.* 92.

Upon a peace warrant.

(3) Upon a warrant from a justice of the peace, to find sureties for the peace or good behaviour. 2 *Haw.* 86. 1 *H. H.* 582. 2 *H. H.* 117.

And in general, Mr. *Dalton* says, an officer upon any warrant from a justice, either for the peace or good behaviour, or in any case where the king is party, may by force break open a man's house, to arrest the offender. *Dalt. c.* 169.

On a search warrant.

(4) On a warrant to search for stolen goods, the doors may be broken open, if the goods are there; and if they are not there, the constable seems indemnified, but he that made the suggestion, is punishable. 2 *H. H.* 151.

Forcible entry.

(5) Where forcible entry or detainer is found by inquisition before justices of the peace, or appears on their view. 2 *Haw.* 86.

Capias utlegatum.

(6) On a *capias utlegatum*, or *capias pro fine*. 2 *Haw.* 86.

Levying a forfeiture.

(7) On the warrant of a justice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any statute, which gives the whole or any part of such forfeiture to the king. 2 *Haw.* 86.

In case of an affray.

(8) Where an affray is made in a house, in the view or hearing of the constable, he may break open the doors to take them. 1 *Haw.* 137. 2 *Haw.* 87.

Disorderly drinking or noise, &c.

(9) If there be disorderly drinking or noise in a house, at an unreasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance, and being refused, may break open the doors, to see and suppress the disorder. 2 *H. H.* 95.

In case of an escape.

(10) Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house. 2 *Haw.* 87.

(11). But

(11) But upon a general warrant, without expressing any felony, or treason, or surety of the peace, the officer cannot break open a door. 1. *H. H.* 584. General warrant.

(12) Neither ought doors to be broken open to take a person, who is required to take certain oaths by virtue of a statute, because in such case the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12 *Co.* 131.

(13) In a civil suit; the officer cannot justify the breaking open an outward door or window in order to execute process. If he doth he is a trespasser. But if he findeth the outward door open, and entreth that way, or if the door be opened to him from within, and he entreth, he may break open inward doors if he findeth *that* necessary in order to execute his process. *Fost.* 319. Civil suit.

For a man's house is his castle, for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit taketh refuge in the house of another, this rule doth not extend to *him*, it is not *his* castle, he cannot claim the benefit of sanctuary therein. *Fost.* 320. A man's house is his castle.

And it is always to be remembred, that this rule must be confined to the case of arrests upon process in civil suits only. For where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace; the party's own house is no sanctuary for him: in these cases, the justice which is due to the publick must supersede every pretence of private inconvenience. *id.* Confined to civil process.

(14) Finally, in all these cases, if an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw.* 87.

7. If there be a warrant against a person, for a trespass or breach of the peace, and he flies and will not yield to the arrest, or being taken makes his escape; if the officer kills him, it is murder. 2 *H. H.* 117. Killing in the arrest or pursuit.

But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing upon his guard, kills him, this is no felony; for he is not bound to go back to the wall, as in common cases of *se defendendo*, for the law is his protection. 2 *H. H.* 118.

But where a warrant issueth against a person for felony, and either before arrest, or after, he flies and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him it is no felony. And the same law is, for a constable that doth it by virtue of his office, or on hue and cry. 2 *H. H.* 118.

But then there must be these cautions: 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 *H. H.* 119.

But tho' a private person may arrest a felon, and if he fly so as he cannot be taken without he be killed, it is excusable in this case for the necessity; yet it is at his peril, that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for

Arrest.

Whether the constable need to shew his warrant.

for an innocent person is not bound to take notice of a private person's suspicion. 2 *H. H.* 119.

8. A person sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it. 2 *Haw.* 85.

And an officer giveth sufficient notice what he is, when he saith to the party, I arrest you in the king's name; and in such case, the party at his peril ought to obey him, tho' he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of false imprisonment. *Dalt. c.* 169.

But the learned editor of *Hale's* history observes hereupon, that the books referred to, do intend the general warrant constituting such person an officer as a bailiff, or the like, in a civil action; tho' it may be otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. 2 *H. H.* 116.

But if he acts out of his precinct, or is not sworn and commonly known, he must shew his warrant if demanded. 2 *Haw.* 85, 86. Otherwise the party may make resistance, and needs not to obey it. *Dalt. c.* 169.

But if the constable has no warrant, but doth it by virtue of his office, as constable, it is sufficient to notify that he is constable, or that he arrests in the king's name. 1 *H. H.* 583.

No arrest by words.

9. If the constable come unto the party, and require him to go before the justice, this is no arrest or imprisonment. *Dalt. c.* 170.

For bare words will not make an arrest, without laying hold on the person. 1 *Salk.* 79. 2 *Haw.* 129.

Retaking after arrest.

10. It hath been holden, that if a constable, after he hath arrested the party by force of a warrant, suffer him to go at large, upon his promise to come again and find sureties, he cannot afterwards arrest him by force of the same warrant: However, if the party return, and put himself again under the custody of the constable, it seems that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice, in pursuance of such warrant; but in this the law doth not seem to be clearly settled. 2 *Haw.* 81.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, altho' he were out of view, or that he shall fly into another town or county. *Dalt. c.* 169.

V. What is to be done after the arrest.

By a private person.

1. When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do any of these three things:

(1) He may carry him to the common goal; but that is now rarely done. 1 *H. H.* 589. 2 *H. H.* 77.

(2) He may deliver him to the constable, who may either carry him to gaol, or to a justice of the peace. 1 *H. H.* 589.

(3) He may carry him immediately to a justice of the peace. 1 *H. H.* 589.

2. If

2. If the constable, or his watch, hath arrested affrayers, or persons drinking in an alehouse disorderly at an unseasonable time of night, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, tho' he deliver them afterwards; or till he can bring them before a justice. 2 H. H. 95. By a watchman.

3. If the arrest is by virtue of a warrant, when the officer hath made the arrest, he is forthwith to bring the party, according to the direction of the warrant: If it be to bring the party before the justice who granted the warrant specially, then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice of the county, then it is in the election of the officer, to bring him before what justice he thinks fit, and not in the election of the prisoner. 1 H. H. 582. 2 H. H. 112. By an officer by warrant.

But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in the stocks, or in an house, till the next day, or such time as it may be reasonable to bring him. 2 H. H. 120.

And when he hath brought him to the justice, yet he is in law still in his custody, till the justice discharge, or bail, or commit him. 2 H. H. 120.

4. But it is said, the constable is not obliged to return the warrant itself, but may keep it for his own justification; in case he should be questioned for what he had done; but only to return what he has done upon it. Lord Raym. 1196. Returning the warrant.

Affault and Battery.

I. *Affault, what.*

II. *Battery, what.*

III. *In what cases they may be justified.*

IV. *How punished.*

I. *Affault, what.*

ASSAULT, *assultus*, from the French *assayler*, is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner. 1 Haw. 133. Affault, what.

And from hence it clearly follows, that one charged with an assault and battery, may be found guilty of the assault, and yet acquitted of the battery: But every battery includes an assault; therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. 1 Haw. 134. Affault and battery.

Notwith-

Assault and Battery.

Words cannot
be an assault.

Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault. *1 Haw. 134.*

II. Battery, what.

Battery, what.

Battery (from the Saxon *batte*, a club, or *beatan*, to beat, from whence cometh also the word *battle*) seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. *1 Haw. 134.*

III. In what cases they may be justified.

When justifiable.

A person may justify an assault, in defence of his person, or of his wife, or master, or parent, or child within age; and even a *wounding* may be justified in defence of his person, but not of his possessions. *3 Salk. 46.*

Also if an officer having a lawful warrant lay hands on another to arrest him, or if a parent in a reasonable manner chastise his child, a master his servant, a schoolmaster his scholar, a gaoler his prisoner, and even a husband his wife, as some say; or if one confine a friend who is mad, and bind and beat him in such a manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another therewith; in all these cases, and such like, it is justifiable. *1 Haw. 130.*

If menaced or
assaulted.

Likewise a person may justify an assault and battery of another, who doth menace or assault him, and attempt to beat him from his lawful watercourse or highway. *Pult. 42.*

Likewise, if a person comes into my house, and will not go out, I may justify laying hold of him, and turning him out. *Nelf. Assault.*

And where a man in his own defence beats another who first assaults him, he may take advantage thereof, both upon an indictment, and upon an action; but with this difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he must plead it specially. *1 Haw. 134.*

IV. How punished.

Punishable,
how.

There is no doubt but that the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. *1 Haw. 134.*

Assault with-
intent to rob.

And by the *21 Geo. 2. cap. 12. sect. 1.* If any person shall with any offensive weapon or instrument, assault, or shall by menaces, or in any forcible manner, demand any money, goods or chattels from any person, with intent to rob such person, and every person so offending being thereof convicted, shall be adjudged guilty of felony, and shall be liable to be transported as in cases of felony, and the courts before whom they shall be convicted, shall

Assault and Battery.

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shall have power of transporting such offenders for seven years, in like manner as other felons may be transported to any of his Majesty's colonies or plantations in *America*, by any law for that purpose now in being.

And by 33 *Geo. 2 cap. 10. sect. 37.* If any person shall assault any officer of his Majesty's revenue, or his assistants, in the due seizing and securing any excisable goods which they have reasonable cause to suspect to be liable to a seizure by the laws of the land, or by force or violence rescue or carry away, or shall procure to be rescued or carried away, any such goods, after legal seizure, every person so offending, being thereof legally convicted, by the verdict of a jury of twelve men, or upon his or her confession, shall for the first offence forfeit one hundred pounds, and upon failure of payment thereof shall suffer imprisonment for twelve months, and for the second offence shall be transported to some of his Majesty's plantations in *America*, there to continue for seven years.

Assaulting revenue officers.

A private assault is not inquirable in the leet, not being a common nuisance, as all affrays are. 1 *Haw. 135.*

Private assault.

Warrant for an assault.

County of *Dublin.*

To the constable of _____

WHEREAS complaint hath been made before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of A. I. of _____ in the said county, taylor, that A. O. of _____ aforesaid, butcher, did on the _____ day of _____ violently assault and beat him the said A. I. at _____ aforesaid in the county aforesaid: These are therefore in his said majesty's name, to command you forthwith to apprehend the said A. O. and to bring him before me, to answer unto the said complaint, and to be further dealt withal according to law: Given under my hand and seal the _____ day of, &c.

Indictment for an assault.

THE jurors for our lord the king upon their oath present, that A. O. of _____ in the said county, butcher, on the _____ day of _____ in the _____ year of the reign of _____ at _____ aforesaid in the county aforesaid, in and upon A. I. taylor, then and there being in the peace of God and of our said lord the king, with force and arms, an assault did make, and him the said A. I. then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the said A. I. and to the evil example of all others offending in the like kind, and against the peace of our said lord the king, his crown and dignity.

ASSISE

Assize, what.

1. **A SSISE** (*assessio*) anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assize* brought before them, by such as were wrongfully put out of their possessions. Which writs heretofore were very frequent; but now mens possessions are more easily recovered by ejectments, and the like. Yet still the judges in their circuits have a commission of *assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

The circuit commissions.

2. To which commission of *assize*, four other commissions are now super-added; to wit,

Gaol delivery.

(1) A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.

Oyer and terminer.

(2) A commission of *oyer and terminer*, directed to the judges and many other gentlemen of the county; by which they are impowered to hear and determine treasons, felonies, and other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol.

Nisi prius.

(3) A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

Peace.

(4) A commission of the *peace* in every county of their circuit.

Sheriffs, justices, and others, to attend there.

3. By the precept for the general gaol delivery above-mentioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

By virtue whereof, all justices of the peace, mayors, and others above-mentioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect. *Cr. Circ.* 4.

Constables presentment.

4. Also by ancient custom (that is, by the common law of the land) before the coming of the judges, the high constables issue their warrants to the petty constables, to make presentments of all crimes and offences cognizable at the assizes; to the intent (as it seemeth) that the judges thereby may have a general information and knowledge, how the peace hath been kept: which presentments being delivered to the high constables, are by them delivered into court, and make up part of the rolls, and other remembrances above-mentioned.

Which said warrants of the high constables perhaps may be best drawn upon the words of the commission of *oyer and terminer*, which is the largest of all the five commissions above-mentioned: And then the form thereof may be thus;

County

County of Dublin. } To the constable of—in the said county.

THESE are to require you the said constable, in his Majesty's name, to make out a presentment in writing of all treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain, and of other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenance, oppressions, champerty, deceits, and all other evil doings, offences, and injuries whatsoever; and also the accessaries of them; by whomsoever, and in what manner soever, done, committed or perpetrated, within your constablewick. Which said presentment so made in writing as aforesaid, and signed by you, you are to deliver to me at—in the said county, on—the—day of—at the hour of—in the forenoon of the same day, that I may have the said presentment ready to be delivered to his said majesty's justices of oyer and terminer and general gaol delivery at the next assizes to be holden for the said county. Herein fail you not, as you will answer the contrary at your peril. Given under my hand, the—day of—in the year of our lord—
JOHN BOWNESS, High Constable.

Attachment.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make fast. The Italian word is *attacare*; the Spanish *attacar*; and the Saxon *tacan*, to take. Derivation.

It signifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of the Four-Courts at Dublin, and above all the court of King's Bench, may proceed in a summary manner, according to their discretion. 2 Haw. 141. Signification.

But in the case of *K. and Bartlett, H. 8 G. 2.* it is said, that generally the sessions have not a power to award an attachment; but the court said, they would not determine how it would have been, if they had committed the person for contempt; but the ordinary and proper method is, by indictment. *Sess. Ca. V. 2. 176.* Power of the sessions to grant it.

Attainder.

THE difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment, as if a man be convicted by verdict or confession; and when he hath his judgment upon the verdict or confession, then he is said to be attainted. 1 Inst. 390. Attainder.

G

That

50
Consequences
of it.

Attainder.

That is to say, his blood is become (*attinctus*) tainted, stained, or corrupted: insomuch that by the common law, in cases of treason or felony, his children or other kindred cannot inherit his estate, nor his wife claim her dower; and the same cannot be restored or saved, but by act of parliament: and therefore in divers instances, there is a special provision by act of parliament, that such or such an attainder shall not work corruption of blood, loss of dower, nor disherison of heirs.

Attaint.

Attaint.

ATTAINT is a writ that lieth, where a false verdict in a court of record, upon an issue joined by the parties, is given. 1 *Inst.* 294. Which is treated of under title *Jurors*.

Attorney.

Attorney,

1. **A**TTORNEY is an antient *English* word, and signifieth one that is set in the *turn*, stead, or place of another. 1 *Inst.* 51.

Justices not to
be attorneys.

2. By the 2 *Geo.* 1. *cap.* 11. no attorney shall be suffered to practise as an attorney before any judge of assise, in the recovering of any small debts, by *civil bill*, in any county wherein he shall be a justice of peace.

Not eligible to
offices.

It is said, that attorneys shall not be elected to any office without their own consent, by reason of their said attendance in the courts. *Cro. Car.* 11. 585.

Unless a deputy
is allowed.

Yet it hath been said, that an attorney shall not be excused by privilege from offices, which may be executed by deputy; but only those which require personal duty. *March.* 30.

Award.

IT is judged not foreign to the office of a keeper of the peace, to have some knowledge of the law contained under this title: Concerning which we will shew,

I. *What things may be submitted to arbitration.*

II. *The several kinds of submission to arbitration.*

III. *The award; and therein what shall be deemed a good award, and what not.*

I. *What*

I. What things may be submitted to arbitration.

1. It is held clearly, that all matters of controversy, either of fact, or of ^{Actions perfo-} a right in things and actions personal and uncertain, may be submitted to arbitration. ^{nal.} 9 Co. 78.

2. Matters of freehold, or any right and title to a freehold, cannot be ^{Matters of} submitted to arbitrament; for a freehold is not transferrable from one to freehold. another, without livery and seisin: Yet if there be a submission concerning the right, title, or possession of lands and tenements, and the parties enter into mutual bonds, to stand to the award made relating to them, they forfeit their bonds unless they obey it. 1 Roll. Abr. 242, 244. Read. Arb. Wood b. 4. c. 3.

So if the condition of an obligation is, to stand to an award touching ^{Condition of} lands; and the arbitrator awards the land to one, and that the other shall bond. release to him: if he doth not release, the obligation is forfeited. 1 Bac. Abr. Arbitrament. A.

But if the arbitrator awards the land to one, it seems the obligation is not ^{Award of} forfeited, tho' the other do not convey to him to make him a good title; for land the arbitrator hath not awarded any act to be done by the party, and the award itself cannot transfer the right, and so must be void, and then the condition of the obligation cannot be forfeited: for the awarding the land to one, cannot be expounded, that the other shall infeoff him. *id.*

And altho' there be no bond, yet if the arbitrator do award that the one ^{Good without} shall infeoff the other; it seems that an action on the case may be bond. maintained for not doing it: for the award in itself is as good as if there were a bond, and then there is the same reason an action should lie, as that the condition of the obligation should be forfeited; for if such an award were void, then the condition of the obligation to perform it could not be broken. *id.*

In like manner an *annuity* is not determinable by award; for it is reckon- ^{Annuity.} ed in nature of a freehold, and therefore cannot pass without the deed of the party. *id.*

So a *partition* cannot be made by award; for a freehold cannot pass (as ^{Partition.} was said) without livery and seisin. *id.*

It hath been doubted whether leases for years, being *chattels real*, ^{Leases for} could be transferred by award; therefore it seems safest, when the con- years. troversy relates to these, that the parties be bound in mutual obligations to perform the award: and then, if the arbitrators award, that one shall assign or transfer the lease to the other; if he refuseth, he forfeits his obligation. *id.*

3. Debts on arrearages of accounts before auditors, shall not be discharg- ^{Matters of re-} ed by award; because it appears of record, and must be discharged by cord. matters of as high a nature. 1 Bac. Abr. Arbitrament. A.

4. Debts due by specialty cannot be discharged by a bare award; but if ^{Debts due by} the submission was by bond, the award would be a good bar; for one speci- specialty. alty may be dissolved by another. 1 Bac. Abr. Arbitrament. A.

A thing certain.

5. A certain and fixed debt is not discharged by an award; for the end and design of an arbitration is, to reduce uncertain debts and duties to a certainty: and to award a man a certain debt, is to give him no more, nor do any greater thing for him, than was done before; for now he can have but an action, and that he might have before; and to give him less than he had before, is to do him a manifest injustice, which the arbitrator cannot do. 1 *Bac. Abr. Arbitrament. A.*

Debts.

But if 20*l.* be due to a man, and he and another submit all personal things to arbitration; there, if the arbitrator award 10*l.* it is a good award: because there were other uncertain things submitted, and the arbitrator had consideration of all, and set one against the other in making the award; so as perhaps the debt of 20*l.* was diminished, in consideration of some trespasses done by him to the other party. *id.*

Criminal offences.

6. Criminal matters, as treasons, murders, felonies, and other offences indictable at the suit of the king, cannot be submitted to arbitrament; for it is for the good of the commonwealth, that such offenders be made known and punished: and the king in such cases is a party, for whom the other parties cannot undertake. And altho' the submission be by bond, yet the obligation is void; and the parties may be punished for entering into such bonds. 1 *Bac. Abr. Arbitrament. A.*

Actions.

But if the party injured proceeds by way of action, as he may in assaults and batteries, libels, and the like; the damages he sustained, or expects to recover, may be submitted to arbitration: for in such case, the action is for himself, and not for the king. *Compleat Arbitrator 28.*

Matrimonial causes.

7. Also, matrimonial causes, or any thing concerning the contract or dissolution of marriage, cannot be submitted to arbitrament. 1 *Roll's Abr. 252.*

Damages.

But the damages a person sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. 16 *Ed. 4. 2.*

II. The several kinds of submission to arbitration.

By parol.

1. A submission by *words* is good, and the party in whose favour the award is made, hath a remedy to enforce a performance of it: Yet it is not expedient that any submission should be by parol, because the party may revoke it at pleasure, at any time before the award made, and that by word likewise; and the judges will rarely enforce the performance of an award, when either the submission or the award is by parol, because it lays so great a foundation for perjury. *Compl. Arb. 21.*

By covenant.

2. Submission may also be by *covenant*; but this method is seldom used: for tho' it contains the same certainty with a bond, yet the method of suing on a covenant is different, and more difficult than in suing on a bond. *Compl. Arb. 7. 46.*

By rule of court.

3. Submission by *rule of court* is made in pursuance of the statute 10 *Will. 3. cap. 14.* which enacteth as follows:

It shall be lawful for all merchants and traders, and others desiring to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action, or suit in equity) by arbitration, to agree that their submission to the award or umpirage be made a rule of any of his majesty's courts of record, which the parties shall choose, and to insert such agreement in their submission, or the condition of the bond or promise, whereby they submit themselves: [Which agreement being so made, and inserted in their submission or promise, or condition of their respective bonds, shall or may, on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entred of record in such court;] and a rule shall thereupon be made in the said court, that the parties shall submit to, and finally be concluded by such arbitration or umpirage; [and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court; and the court on motion shall issue process accordingly;] which process shall not be stopped or delayed in its execution, by any order of any other court of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award was procured by corruption, or other undue means.

Affidavit.

Contempt of court.
Execution of process.

And this is allowed to be the most expeditious way; and the method is to get a counsel to move in any of the courts to have it made a rule, which, in such case is never denied; and then the party is liable to the same penalties that he would be for disobeying any other rule of court. *Compl.*

Motion of counsel.

Abr. 6, 47.

4. Or lastly, the submission may be by bond. In which case each party must give to the other a bond; which bond, and condition, must contain exactly the same words, only changing the names of the parties. And the penalty of the bond should at least be the value of the thing submitted; so that the party may rather abide by the award, than forfeit his obligation. *Compl. Arb.* 46.

Submission by bond.

And undoubtedly a submission by bond in some respects, exceeds a submission by rule of court; for an award made pursuant to bonds of submission may bind the party's executors; but if the party, who refuses to perform an award made pursuant to a rule of court, shall die, the act of parliament directing that the prosecution shall be carried on by attachment, the remedy being lost, the award is lost likewise. *Compl. Arb.* 34.

5. Sometimes the submission is both by bond and rule of court, by adding the party's consent at the bottom of the condition of the bond; and this is still the best way, for then the party may proceed which way he pleases: and it is said, that he may proceed both ways; that is to say, both on the bond, and have an attachment likewise for the contempt.

Both by bond and rule of court.

1 Salk. 73.

6. But in which way soever the submission is made, the same nevertheless may be revoked, tho' made irrevocable by the strongest words: for a man cannot by his own act, make such authority or power not

Whether the submission may be countermanded.

coun-

countermandable, which by the law and in its own nature is countermandable. 8 Co. 82.

Revoking submission.

But if the submission be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he shall stand to and abide the award. And if he revokes, he must likewise give notice of the revocation; and if the submission was by bond, the revocation must be in writing. 8 Co. 82.

Attachment.

And if the submission be made a rule of court, pursuant to the act of parliament; if either of the parties revokes, the court will grant an attachment. *Compl. Abr.* 82.

Parol submission.

But if the submission be by word, the party may revoke at pleasure, and he forfeits nothing; but he must in this case likewise give notice of the revocation, tho' it need not be in writing: and the notice must be to the arbitrators themselves. 8 Co. 82.

III. The award (C); and therein what shall be deemed a good award, and what not.

Arbitrators cannot administer an oath. Award best to be in writing. According to the submission.

1. The arbitrators cannot injoin an oath to the witnesses, there being no law which gives them any such power.

2. It is highly convenient that the award be in writing, and so to be mentioned in the submission. *Compl. Arb.* 34.

3. One thing essential to a good award is, that it be made, with respect to persons and things, according to the submission. *Wood b.* 4. c. 3.

Releases to the time of the submission.

Upon which ground, as the arbitrators are, with respect to the things submitted, circumscribed and tied down to the submission, so in several cases it has been disputed, whether their awarding releases to the time of the award, and not to the time of the submission, was good; it is therefore most advisable to award releases to the time of the submission; tho' it is now clearly held, that general releases shall extend only to the time of the submission, and that, if there be releases awarded to the time of the award, they shall be good, unless it be shewn on the other side, that some new matter hath arisen between the parties between the submission and award. 1 *Roll. Abr.* 242. 6 *Mod.* 34.

That is to say, an award of releases to the time of making the award, includes all that is within the submission, and more; which shall be good for so much as is within the submission, and void for the residue. 1 *Bac. Abr.* Arbitrament. E.

If the submission be, *so as the award be ready to be delivered to the parties or to such of them as shall desire the same*, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the submission be *so that the award be delivered to each party by such a day*, then it must be delivered to each party accordingly. *Read. Abr. Wood b.* 4. c. 3.

But tho' the words of the submission may be such, as will oblige the parties to take notice of the award at their peril; yet if the arbitrators award that one of the parties shall do an act, which depends upon another first to be

be done of the other party, he must have notice of it; at least the party who would take advantage of it, must shew that he hath done what was necessary on this part. *Compl. Arb.* 12.

An award that one shall pay for the writings of the award, or the reckoning in the house where the award was made, is a void award; for such things are plainly out of the submission. *1 Roll. Abr.* 254.

4. Also, it is required, that the award be beneficial, and appoint some things advantageous to either party; for an award of one side only, is not good: so if an award be, that one of the parties shall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Award of one side not good.*

Wood b. 4. c. 3.

So if a man and woman submit themselves to an award, it is no good award that they shall *intermarry*, for this is not intended any advantage. *1 Roll. Abr.* 252. And the bodies of the parties are not submitted to arbitration. *1 Bac Abr.* Arbitrament. E.

Where an award was, that the defendant should pay to the plaintiff two sums at several times, and that several releases should be given presently; it was objected, that by giving such releases, the bond and money would be discharged, and therefore the awarding the releases was void against the plaintiff, and so there is nothing of his side to be done: And of this opinion was the court. But where the award was, that money should be paid at two several days, and releases given, so that it appears by the very method and order of the award, that the general releases were not to be given till after the money paid; the court were clear of opinion, that it was well enough, and so judgment was given for the plaintiff. *2 Mod.* 169.

5. Also it is required in a good award, that it be possible, and lawful. *Must be possible and lawful.*

Wood b. 4. c. 3.

Thus, if an award be, that one of the parties shall kill, steal, forge a deed, or the like, it is void. *1 Inst.* 206.

In like manner, if it be awarded, that money shall be paid to an infant, and that he shall make a release, it is void; for the infant's release is not good in law.

Also it is held, that where a thing is awarded to be done, which afterwards becomes impossible by the act of God, the party is excused; as if an award be, to deliver a horse before such a day, and he dies before that day.

21 Ed. 4. 70.

6. Also, it is required, that the award be certain and final. *Award to be certain and final.*

Wood b. 4. c. 3.

Upon which ground it hath been resolved, that if the arbitrators award, that one of the parties beg the other's pardon before such a mayor, or such and such persons, it is good and certain enough; but if the award be, that he shall beg pardon in such manner and in such place as the other party shall appoint, it is not good: for the arbitrators are to determine, and not to make such party his own judge in his own cause. And tho' the time and place be but circumstances, yet in this sort of satisfaction they make the most considerable part. *1 Salk.* 71.

Upon which ground also, the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed them is expired; for then such their award is not certain and final. *Cro. Jac.* 585.

An

Award to give security.

An award that the defendant shall give security to the plaintiff, for payment of a sum of money, is void for the uncertainty; not shewing what security he should give, whether by bond or otherwise. *Cro. Ja.* 314.

In the case of *Winter and Garlick, T. 3. An.* it was awarded, that the defendant should pay to the plaintiff 10*l.* and all the costs of a suit then depending in an inferior court, and afterwards to give mutual releases. By the court: An award to pay such costs as the master shall tax is good, because it may be reduced to a certainty; but this is uncertain, and carries it farther than has hitherto been allowed. And *Holt* chief justice said, that it hath been held a good award, to pay such costs as the prothonotary shall tax, and that carries it far enough; but that surely the arbitrators should either ascertain it themselves, or refer it to a proper officer. 1 *Salk.* 75. 6 *Mod.* 195.

But in the case of *Dudley and Nettleford, H. 13 G.* where it was awarded, that the plaintiff should pay the costs, and no body was appointed to tax them, the court supplied it by ordering the master to do it. *Str.* 737.

After naming an umpire.

7. It is settled, that arbitrators cannot proceed on a reference, after they have once named an umpire; for then their authority ceaseth, tho' the time for making the award is not expired. *Rep. of Praet. in C. B.* 116. *Danes and Monfay. E.* 8 G. 2.

Arbitrators cannot proceed, after appointing an umpire.

But the appointment of an umpire before their own time for making an award is expired, may be good: As in the case of *Doyley and Pitsae, T. 28 G. 2.* An action of debt was brought upon a bond, conditioned that the parties should submit to the award of two arbitrators, provided they made their award on or before the 13th of March next; and if they made no award, then that they should appoint an umpire before the 17th of the said March. The defendant pleaded, that no award was made on or before the said 13th day of March; but that they did, before the said 17th of March, to wit, upon the 11th, chuse and appoint an umpire, who had made an award. By the court: There are no words, which by any construction can be intended to limit or circumscribe the election of an umpire till after the 13th of March. The plain sense of the submission is, that they should make their award by a certain day; or in case they did not make it, or could not agree, that then they should nominate an umpire. And they said, the court has not been nice in construing the time of the umpire's appointment, provided it was soon enough for him to make his award.

Award to be construed favourably.

8. Generally the award shall be expounded according to the intent of the arbitrators, and not literally, and shall not be unravelled in a court of equity, unless there was corruption in the arbitrators. 10 *Co.* 57. *Wood b.* 4. c. 3. *Read. Arb.*

Corruption or unfair practice.

But in the case of corruption, or other unfair practice, it is enacted by the aforesaid statute of 10 *Will.* 3. *cap.* 14. that any arbitration or umpirage procured by corruption or undue means, shall be deemed void, and accordingly be set aside by any court of law or equity, so as complaint thereof be made in the court where the rule is made, before the last day of the next term after publishing the arbitration. *f.* 2.

Chosen by the parties.

But otherwise, as the arbitrators are persons of the parties own chusing, and as the law presumes that every man will be so wise as to pitch upon a person

person whose understanding and honesty he can rely on; it hath seldom happened, that an award was held void when there appeared nothing else to vitiate it, especially in a court of law: yet awards have been, and are often set aside in a court of equity, for corruption and want of understanding in the arbitrators. *Compl. Arb.* 73. Want of understanding.

Therefore it is the interest of both parties, to chuse men of honesty and understanding to be their arbitrators, and to acquaint them truly with the facts they are to go upon; for if they appear to be mistaken in a matter of fact, a court of equity will set aside the award. *2 Vern.* 705. Mistake in matter of fact.

But a bare suggestion of want of understanding, or want of honesty, will not be sufficient; the proof must be strong, and the rather, because (as was said) they are of the party's own chusing, who by his choice of them, admitted them to be wise and honest enough for his purpose. *Compl. Arb.* 74.

If a submission is to three arbitrators, or any two of them, and two of them by fraud or force will exclude the other; that alone is sufficient to vitiate the award: or if they have private meetings, and admit one of the parties, but give no notice to the other, but suffer the attorney of the party whom they admitted, to draw up the award; such award shall be set aside for partiality and unfairness. *2 Vern.* 514. Partiality in an award.

It is a general rule in equity, that when it appears that any one of the arbitrators was any way interested in the matters in controversy, the award is to be set aside. *Compl. Arb.* 75. Arbitrators interested.

And it is the strongest argument of partiality, to shew that the arbitrators received from either of the parties any considerable sum of money, or any other present which may be a temptation to act corruptly; but the sum or present must be proved to be so exorbitant, as to induce the court to believe that it biased their judgments; otherwise it will be of no effect. *Compl. Arb.* 76. Receiving a present.

10. If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party who would take advantage of it, must shew that he has done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it shall be done immediately. *2 Brown.* 311. Where the award appoints no time, the thing is to be done immediately.

11. If the submission is by rule of court, it is necessary that there be a personal demand of the thing awarded; and the party must make affidavit of such demand, before he can have an attachment. *1 Salk.* 83. Demand to be before attachment.

12. If a sum of money be awarded to one of the parties, and that upon the payment thereof they both shall give mutual releases; if he who is to receive the money, refuses it, yet upon a tender and refusal, he is as much obliged to sign a release as if he actually received it. *1 Salk.* 75. On tender and refusal, the party refusing shall nevertheless sign a release.

A. Form of submission by rule of court.

WHEREAS divers disputes and controversies have arisen, and are now depending, between A. B. of ——— in the county of ——— yeoman, of the one part, and C. D. of ——— in the said county, yeoman, of the other part, touching and concerning ——— Now for the ending and deciding thereof it is hereby mutually agreed by and between the said parties, that all
H matters

Award.

matters in difference between them for, touching, and concerning all and every the matters and things herein above specified and particularly mentioned, shall be referred and submitted to the arbitrament, final end, and determination of A. A. of — in the said county, gentleman, B. A. of — in the said county, yeoman, and C. A. of — in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the — day of — next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of — In witness whereof the said parties to these presents have hereunto set their hands this — day of — in the — year, &c.

B. Arbitration bond.

KNOW all men by these presents, that I A. B. of — in the county of — gentleman, am held and firmly bound to C. D. of — in the said county of — yeoman, in — pounds of good and lawful money of Great Britain, to be paid to the said C. D. or to his certain attorney, his executors, administrators, or assigns: To which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the — day of — in the — year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and in the year of our lord —

Condition to stand to the award of two arbitrators, in common form :

THE condition of the above obligation is such, that if the above-bound A. B. his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe, and keep the award, order, arbitrament, final end and determination of A. A. of — esquire, and B. A. of — gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the abovebound A. B. as of the abovenamed C. D. to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages, and demands, whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done, or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the — day of — now next ensuing, then this obligation to be void, otherwise of force.

If

If the parties have a mind to make their submission a rule of court, then this may be added :

And the abovebound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of _____ pursuant to the act of parliament in such case made and provided.

Condition to stand to the award of three arbitrators, or any two of them, and an umpire appointed :

THE condition of this obligation is such, that if the abovebound A. B. his heirs, executors, and administrators, for and on his and their parts and behalfs shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination of _____ or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said A. B. as by and on the part and behalf of the abovenamed C. D. to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties ; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the _____ day of _____ now next ensuing ; then this obligation to be void, otherwise of force.

And if the said arbitrators shall not make such their award of and concerning the premisses, within the time limited as aforesaid, then if the said A. B. his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage [if the umpire be named] of _____ being a person indifferently named and chosen between the said parties for umpire ; [if not named] of such person as the said arbitrators shall indifferently chuse for umpire in and concerning the premisses ; so as the said umpire do make and set down his award and umpirage in writing, under his hand seal, ready to be delivered to the said parties in difference, on or before the _____ day of _____ now next ensuing : Then this obligation to be void, otherwise of force.

[And the abovebound A. B. doth agree and desire, that this his submission be made a rule of his Majesty's court of _____ pursuant to the act of parliament in such case made.]

C. Form of an award.

TO all to whom these presents shall come, we A. B. of — and C. D. of — do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen, between — of — yeoman, of the one part, and — of — yeoman, of the other part; And whereas, for the putting an end to the said differences, they the said — and — by their several bonds or obligations bearing date — last past, are reciprocally become bound each to the other, in the penal sum of — to stand to, abide, perform, and keep the award, order, and final determination of us the said — so as the said award be made in writing and ready to be delivered to the parties in difference on or before — next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say, First, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premisses, to the day of the date hereof, shall cease and be no farther prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning the premisses. And we do also award and order, that the said — shall deliver or cause to be delivered to the said — at — within the space of — &c. And further, we do hereby award and order, that the said — shall on or before — pay or cause to be paid unto the said — the sum of —. We do also award and order, &c. And lastly, We do award and order, that the said — and — on payment of the said sum — shall in due form of law, execute each to the other of them; or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premisses aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the — day of — last past (viz. the day of the date of the arbitration bonds). In witness whereof we have hereunto set our hands and seals the — day of —

Form of an umpirage,

RECITE the arbitration bonds as before). Now know ye, that I — umpire indifferently chosen by — having deliberately heard and understood the griefs and allegations and proofs of both the said parties, and willing (as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge as followeth; That is to say, &c.

BY

BY the act. 8 Ed. 4. cap. 2. No persons called badgers shall buy any corn upon such pain as is made against the regrators of the King's market, and to be judged as common regrators of the market, also it shall not be lawful to no man which will buy any manner of corn in the common market to sell the same again in the same market, nor in no other market upon pain to be adjudged a common regrator of the market.

Bail.

- I. *What it is.*
- II. *Difference between bail and mainprise.*
- III. *When a person may be discharged without bail.*
- IV. *Who may or may not be bailed*
- V. *Who may bail and the manner of it.*
- VI. *Requiring excessive bail.*
- VII. *Denying bail where it ought to be granted.*
- VIII. *Granting bail where it ought to be denied.*
- IX. *Of bail by writ of habeas corpus.*
- X. *Acknowledging bail in another man's name.*

I *What it is.*

BAIL (from the French *bailler*, to deliver) signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him, that he shall appear at a day limited, to answer and be justified by the law. *Hale's Pl. 96.*

II. *Difference between bail and mainprise*

The difference between bail and mainprise is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Hale's Pl. 96.*

III. *Where a person may be discharged without bail.*

If a person be brought before a justice, if it appears that no felony is committed, he may discharge him; but if a felony be committed, tho' it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him. *Hale's Pl. 98.*

IV. *Who*

IV. Who may or may not be bailed.

What offenders
bailable.

At the common law, bail was allowed in all cases but homicide; but now the *Eng. stat. 3 Ed. 1. c. 15.* directeth what offenders shall be bailed, and what not. *Hale's Pl. 97.*

Persons not re-
plevifable.

It is true, the said statute only prescribeth who shall or shall not be let to bail by the sheriff; but by *10 Car. 1. sess. 2. cap. 18.* it is enacted, that no justice or justices of the peace shall let to bail or mainprise any person not replevifable by the said statute of *3 Ed. 1 cap. 15.*

*Eng. stat. 3
Edw. 1.*

Which statute is as follows: *Forasmuch as sheriffs and others, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevifable, and have kept in prison such as were replevifable, because they would gain of the one party and grieve the other; and forasmuch as before this time it was not determined which persons were replevifable, and which not, but only those that were taken for the death of a man, or by commandment of the king, or his justices, or for the forest: It is provided, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manner, and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provors so long as the provors be living, (if they be not of good name,) and such as be taken for houseburning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevifable by the common writ, nor without writ. But such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petit larceny, that amounteth not above the value of 12 d. if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment, or force, or of aid in felony done, or guilty of some other trespass for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief nor defamed), shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods.*

Sheriffs and
gaolers.

Sheriffs and others] That is to say, sheriffs and goalers that have custody of gaols; so that this act extends not to any of the kings justices or judges of any superior courts of justice. *2. Inst. 185.* But by a subsequent statute (as hath been said) it is extended to justices of the peace.

But only those, &c.] Here are first set down four sorts of persons which before this act were not bailable by the common writ *de homine replegiando*:

Homicide not
bailable.

1. Those that were taken for the death of a man] By the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to prison; but afterwards it was provided by parliament, that in case of homicide the offender was not bailable. *2. Inst. 186.*

And

And even if a person hath dangerously *wounded* another, the justice ought to be very cautious how he takes bail, till the year and day be past; for if the party die, and the offender appear not, he is in danger of being severely fined. 1 *Haw.* 138. Dangerously wounding.

And this statute makes no distinction between such homicide as is malicious, and that which happens by misadventure or in self defence: And it seems agreed, that justices of the peace, who have power at this day to bail a man arrested for a *light suspicion* of homicide, cannot bail any such person for manslaughter, or even excusable homicide, if it manifestly appear that he was guilty of the fact, let it be ever so plain that it cannot amount to murder. 2 *Haw.* 95, 105. Manslaughter.

2. Or by *commandment of the king*] That is, by matter of record in one of his courts, according to law; and not an extrajudicial commandment. 2 *Inst.* 186, 187. Commandment of the King, So also it is provided in the petition of rights 3 *Car.* that no person shall be detained in prison by the king's special command, without cause certified.

And because some courts, as the king's bench, are before the king, and some before his justices, therefore the act saith, *by commandment of the king*, and the next words be, *or of his justices*. 2 *Inst.* 186. or of his justices;

3. Or of *his justices*] That is, of any of the courts at *Dublin*, or justices of assize. 2 *Haw.* 96.

4. Or for the *forest*] But as to imprisonment for offences in forests, the law hath been much mitigated by later statutes. 2 *Haw.* 98. Forrest law.

All these four are excepted out of the common writ *de homine replegiando*, that the sheriff in his county court, which is not a court of record, shall not replevy any of these four that are committed, altho' it should be by an unlawful commitment; but the superior courts at *Dublin*, upon an *habeas corpus*, shall do justice to the party in all these four cases. 2 *Inst.* 187.

Next, the act doth further provide, that these kinds of prisoners hereafter following (being 13 in number) shall not be repleviable:

1 *Such prisoners as before were outlawed*] Persons outlawed are *attainted* in law, and therefore are notailable; for the intendment of the law is, that the person standeth indifferent whether he be guilty or no; and not if he be convicted or attainted. 2 *Inst.* 188. Outlawed persons.

2. And they which have *abjured the realm*] For these also are attainted upon their own confession, and therefore notailable at all by law. 2 *Inst.* 188. Abjured the realm.

3. *Provors.*] A provor, or *approver*, is a person that confesseth the felony with which he is charged, and undertakes to *prove* another guilty of the same crime; which if he does, he saves his own life, otherwise he shall be immediately executed. And the reason why they are notailable is, because they are guilty by their own confession, and therefore they do not stand indifferent. 2 *Inst.* 188. Approvers

But this concerns not justices of the peace, because no man can become an approver before them, for that they cannot assign a coroner. *Hale's Pl.* 102.

4. And

Persons taken
with the man-
ner.

4. *And such as be taken with the manner*] For in this case likewise he standeth not indifferent whether he be guilty or no, being taken with the *manner*, that is, with the thing stolen as it were in his *band*, anciently called *handbab-bend*, and the like was anciently called *backberend*, as a bundle or fardle at his *back*; which was used to signify manifest theft. 2 *Inst.* 188.

Breakers of
prison.

5. *And those which have broken the king's prison*] Here are two offences; first, his breaking of the prison, for it is presumed that he who is innocent will never break prison: and secondly, his flying, because he confesseth the fact who flies from judgment. 2 *Inst.* 188.

Notorious
thieves.

6. *Thieves openly defamed and known*] Who, as it seems, ought not to be bailed for any fresh felony, whereof there is probable evidence against them. But this seems in a great measure to be left to the discretion of the person who has power to bail them, who on consideration of the circumstances of the whole matter, and the probabilities on both sides, if he finds it reasonable strongly to presume them to be guilty, ought not to bail but commit them. 2 *Haw.* 99.

Appealed by
provors.

7. *Such as be appealed by provors, so long as the provors be living, if they be not of good fame*] The appeal of the approver is forcible against the appellee, because the approver confesseth himself guilty of the same felony, and therefore it serveth in nature of an indictment against the appellee, so long the approver liveth, unless the appellee be of good fame. 2 *Inst.* 188.

House-break-
ers.

8. *And such as be taken for houseburning feloniously done*] This was felony by the common law. 2 *Inst.* 188.

False money.

9 *Or for false money*] This was treason by the common law. 2 *Inst.* 188.

Counterfeiting
the King's seal.

10. *Or for counterfeiting the king's seal*] This was also treason by the common law. 2 *Inst.* 188.

Excommuni-
cate persons.

11. *Or persons excommunicate, taken at the request of the bishop*] That is, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the king's writ of *excommunicato capiendo*, is notailable: For in ancient times men were excommunicated but for heresies, or other heinous causes of ecclesiastical cognizance; and not for small or petty causes; and therefore in those cases the party was notailable by the sheriff or gaoler without the king's writ; but if the party offered sufficient caution *de parendo mandatis ecclesie in forma juris*, then should the party have the king's writ to the bishop to accept his caution, and to cause him to be delivered: And if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the chancery to the sheriff for his delivery: Or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court hath no cognizance, he shall be delivered by the king's writ without any satisfaction. 2 *Inst.* 189.

Writ for deli-
very.

Manifest offen-
ces.

12. *For manifest offences*] Which seems to be understood of inferior crimes of an enormous nature under the degree of felony; as dangerous riots, ex-orbitant

orbitant rescoues, misprision of treason, præmunire, and such like heinous offences. Yet it seems to be in a great measure left to discretion, to judge in what case their crime is so flagrant and enormous, that they ought not to have the benefit of it. 2 Haw. 99.

13. Or for treason touching the king himself] By the common law, a man accused or indicted of high treason, or of any felony whatsoever, was bailable upon good surety, until he were convicted; for at common law, the gaol was his pledge or surety, that could find none. 2 Inst. 189. Treason touching the King.

Shall be in no wise replevisable by the common writ, nor without writ] That is, the sheriff shall not replevy them by common writ *de homine replegiando*, nor without writ, that is, *ex officio*: But all or any of these may be bailed in the king's bench. 2 Inst. 189. May be bailed in the King's bench.

Next the act setteth down seven kinds of offenders that may be bailed: Offences bailable.

1. Such as be indicted of larceny by inquests taken before sheriffs or bailiffs] That is, before sheriffs in their torns, or lords in their leets, or those that have *infangthief* and *outfangthief*; that is, who have the privilege to judge thieves taken *within* their fee, or thieves dwelling within their manor and taken for felony *out* of their fee. Yet this is expounded that they be of good fame. 2 Inst. 190. Indicted of larceny.

2. Or of light suspicion] But if the presumption be strong, or the defamation great, the justices may refuse to bail him. *Hale's Pl.* 102. And this is expounded also that they be of good fame. 2 Inst. 190. Of light suspicions.

3. Or for petit larceny that amounteth not above the value of 12 d. if they were not guilty of some other larceny aforetime] This act divideth larceny into two kinds; grand larceny, when the thing stolen is above the value of 12 d. and petit larceny, when it is of the value of 12 d. or under. 2 Inst. 189. Petit larceny.

And it seems to be agreed, that there is no necessity that such persons be of good fame; yet upon the construction of the whole statute, if such persons be taken with the manner, or confess the fact, or their crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any colour of probability for their innocence, it seems most agreeable to the intention of the statute to bail them. 2 Haw. 101.

4. Or guilty of receipt of felons] These are accessaries after the fact. 2 H. H. 100. Receipt of felons.

5. Or of commandment, or force, or of aid in felony done] These are accessaries before the fact. 2 H. H. 100. Aiding in felony.

But accessaries to felonies are not to be bailed, unless they be of good reputation: And it seems at this day to be settled, that where there are strong presumptions of guilt, such accessaries are not bailable by this statute. 2 Haw. 102.

6. Or guilty of some other trespass, for which one ought not to lose life nor member] But it seems reasonable to qualify the generality of this expression, Guilty of trespass.
with

with this limitation, that such accusation ought to be either on a light suspicion, or else that the offence be inconsiderable, or that it be not excluded from bail by some special act of parliament. 2 *Haw.* 99. 2 *H. H.* 135.

Appealed by a
provor.

7. *And a man appealed by a provor, after the death of the provor, if he be no common thief, nor defamed]* And dy parity of reason, he may be bailed, if the approver waive his appeal, or be vanquished. 2 *Haw.* 98.

Be let out by sufficient surety] If a justice take insufficient surety, and the party appear not, he is finable by the judge of Assize *H. P.* 97. But if the prisoner appear thereupon, the justice is safe. 2 *Haw.* 89.

And if a person who has power to take bail, be so far imposed upon, as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal, for that insufficient sureties are no sureties. 2 *Haw.* 89.

And the person who is to take the bail, may examine them on their oaths concerning their sufficiency. 2 *Haw.* 89. 2 *H. H.* 125.

In criminal of-
fences only.

It is to be observed, that the abovesaid statute extends only to bail in criminal offences, and therefore gives no power at all to justices of the peace to bail any persons on process in civil actions, or for contempts to superior courts. 2 *Haw.* 106.

There are furthermore many statutes, which prohibit bail and mainprise in very many cases, and allow the same in many others, which are interspersed among the several titles which treat of those matters.

And where a statute ordaineth, that an offender shall be imprisoned at the king's will or pleasure, there the prisoner cannot be bailed, till he hath redeemed his liberty by such fine or ransom as shall be assessed by the king's justices in his courts. *Dalt. c.* 167.

Altho' a person be committed to be detained without bail or mainprise, yet if the offence be by law bailable, he that hath power of bailing may bail him. 2 *H. H.* 135.

V. Who may bail, and the manner of it.

Who may bail.

By the common law, the sheriff and every constable, being conservators of the peace, might have bailed one suspected of felony; but this authority is transferred from them to the justices of the peace by several statutes. *Lamb.* 15.

Two justices.

And it seems to be a good general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime: And upon this ground it seems clear, that any two justices (1 *Q.*) may of common right bail persons indicted at the sessions, for that any two such justices may hear and determine the indictment. Also it hath been holden, that any one justice hath the like power; and this seems to be implied by the statute of 1 *R.* 3. *c.* 3. which giving one justice power of bailing persons arrested for felony, *in like form as if such persons had been indicted at the sessions*, clearly supposes, that if such persons had been indicted at the sessions, they might have been bailed by any one justice

tice. And if any one justice had such power, before the statute specially relating to the power of justices in granting bail, it seems that he hath still the same power in relation to persons so indicted of anyailable crime under the degree of *felony*, because the said statutes seem not to restrain him in any such case, under the degree of felony, from any power which he lawfully might claim before. 2 *Haw.* 103. One justice.

But it seems difficult to maintain the power of one justice to bail a person, for any crime *before* indictment, unless by some statute it be limited to the conusance of one justice, or unless it be an offence directly tending to the breach of the peace, the bailing of persons for which seems properly to come under their conusance as conservators of the peace. 2 *Haw.* 105.

And *Mr. Dalton* says, if it is not in case of felony, it seemeth that any one justice alone may bail a prisoner, except where it is otherwise ordered in particular instances by some special statute. *Dalt. c.* 12.

And it seems to be agreed, that any one justice might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances that the party is most likely to live or die; for that every such justice being a principal conservator of the peace, the offence at present being only an enormous breach thereof, and no felony, seems properly to come under his conusance. 2 *Haw.* 103. Not in felony.

1. But by 10 *Car.* 1. *sess.* 2. *c.* 18. *sect.* 3. Any person arrested for manslaughter or felony, beingailable by law, shall not be let to bail by any justices of peace, if it be not in open sessions, except it be by two justices of peace at the least, whereof one to be of the *quorum*, and the same justices to be present together at the time of the bailment, which bailment they shall certify in writing, subscribed with their own hands, at the next general gaol-delivery. In open sessions.

2. The said justices, when any such prisoner is brought before them, before any bail, shall take the examination of the prisoner, and information of them that bring him, of the fact and circumstances thereof, and as much thereof as shall be material shall put in writing before they make the bailment; which examination, together with the bailment, the said justices shall certify at the next general goal-delivery. *f.* 4. Examinations to be taken.

3. Every coroner upon any inquisition before him found, whereby any person shall be indicted for murder or man-slaughter, or as accessory before the murder or man-slaughter committed, shall put in writing the effect of the evidence given to the jury before him being material, and as well the said justices as the said coroner shall have authority by this act, to bind all such by recognizance, as declare any thing material to prove the said murder or man-slaughter, or offences or felonies, or to be accessory, to appear at the next general gaol-delivery where the trial thereof shall be, to give in evidence against the party so indicted, and shall certify as well the evidence, as such bonds as he shall take, together with the inquisition or indictment. And the said justices shall certify every such bond taken before them. *f.* 5. Evidence to be put in writing.

4. ^{next} If any justice of peace of *quorum*, or coroner, shall offend in any thing contrary to the intent of this act; the justices of gaol-delivery where such offence shall happen to be committed, upon due proof thereof by examination before them, shall for every such offence set such fine on every of the justices of the peace and coroner, as the same justices of gaol-delivery Recognizance.

delivery shall think meet, and estreat the same as other fines and amercements, assessed before justices of gaol-delivery, ought. *f. 6.*

VI. Requiring excessive bail.

Excessive bail. By the declaration of rights, 1 *Will. & Mar. stat. 2. cap. 2.* Excessive bail ought not to be required.

VII. Denying bail where it ought to be granted.

Refusing bail. To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor punishable not only by the suit of the party, but also by indictment. 2 *Haw. 90. H. P. 97.*

VIII. Granting bail where it ought to be denied.

Offences forbidden to be bailed. By the 10 *Car. 1. sess. 2. cap. 18. sect. 2.* No justices of peace, shall let to bail or mainprise any person for any offence forbidden to be bailed by the statute of Westminster the first.

Punishable as for an escape. Admitting bail where it ought not, is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. *H. P. 97.*

If the keeper of a prison bail any not bailable, he shall loose his fee and office; if another officer, he shall have three years imprisonment, and make fine at the king's pleasure. 3 *Edw. 1. cap. 15.*

M. 18 G. 2. K. and William Clarke, esquire. He as a justice of Surrey committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. *Str. 1216.*

IX. Of bail by writ of habeas corpus.

Writ of habeas corpus. If bail cannot otherwise be obtained, the law in England hath provided a remedy in most cases by the *habeas corpus* act. *Eng. stat. 31 Car. 2 c. 2.* But no law for this purpose has been hitherto enacted in Ireland.

X. Acknowledging bail in another man's name.

Acknowledging bail.

By 10 *Car. 1. sess. 2. cap. 18.* If any person shall acknowledge, or procure to be acknowledged, any bail in the name of any other not privy to the same; he shall be guilty of felony without benefit of clergy,

In the name of another.

In the name of any other] T. 6 G. Two people put in bail in feigned names, and because there were no such persons, they could not be prosecuted

ed for personating bail on this statute. So the court ordered them and the attorney to be set in the pillory, which was done accordingly. *Str.* 384.

Bail taken before a judge is not within this statute, till it be filed of record. *1 H. H.* 696.

But it is within the following statute of *7 Will. 3. cap. 18.* by which it is ^{Felony.} enacted, that any who shall personate another before those who have authority to take bail, so as to make him liable to the payment of any sum of money in that suit or action, shall be guilty of felony (but within clergy).

Form of bail.

County of **B**E it remembred, that on the — day of — in the —
Dublin. year of the reign of — A. O. of — yeoman, A. B. of — yeoman, and B. B. of — yeoman, came before us J. M. esquire, and R. B. clerk, two of his majesty's justices of the peace, in and for the said county, one whereof is of the quorum, and severally acknowledged themselves to owe to our said lord the king, that is to say, the said A. O. 20l. and the said A. B. and B. B. 10l. each, to be respectively levied of their lands and tenements, goods and chattels, if the said A. O. shall make default in the performance of the condition indorsed, [or, underwritten].

J. M.

R. B.

The condition of this recognizance is such, that if the within [above] bound A. O. shall personally appear before the justices of our sovereign lord the king assigned to keep the peace within the said county. and likewise to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter-sessions of the peace [or, before his majesty's justices of gaol delivery, at the next general gaol delivery] to be holden in and for the said county, then and there to answer to our said sovereign lord the king, for and concerning the felonious taking and stealing of — the property of A. M. of — yeoman, with the suspicion whereof the said A. O. stands charged before us the said justices, and to do and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above [within] written recognizance shall be void.

Or, if the party is in prison, and so absent, Lord Hale says, this is the true form from Lambard.

Dublin. **B**E it remembred, that on the — day of — in the —
year of the reign of — before us J. M. esquire, and R. B. clerk, two of the justices of our said lord the king, assigned to keep the peace within the said county, and one of us of the quorum, at — in the said county did come A. B. and B. B. of — in the said county, yeomen, and took in bail until the next gaol delivery to be holden in the said county, one A. O. of — labourer taken and detained in prison for suspicion of a certain felony in stealing — the property of — and took upon themselves each of the said A. B. and B. B. under the penalty of 20l. of good and lawful money of Great Britain, of the goods

Bail.

goods and chattels, lands and tenements, of them and each of them, to the use of our said lord the king, his heirs and successors, to be levied, if the said A. O. shall not personally appear at the said next gaol delivery, before the justices of our said lord the king, assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of England. Given under our seals, &c.

But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,

*Taken and acknowledged the day and year
above-written, before us the above said*

J. M.

R. B.

And hereupon a warrant issues for his deliverance, thus:

Dublin. **J.** M. esquire, and R. B. clerk, two of the justices of——— and one of us of the quorum, To the keeper of his majesty's gaol at——— in the said county, greeting. Forasmuch as A. O.——— labourer, hath before us found sufficient sureties to appear before the justices of gaol delivery at the next general gaol delivery to be holden in the said county, to answer to such things as shall be then on the behalf of our said sovereign lord objected against him, and namely, to the felonious taking of——— (for the suspicion whereof he was taken and committed to your said gaol); We command you on the behalf of our said sovereign lord, that if the said A. O. do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under our seals at Kilmainham in the said county, the——— day of——— in the——— year———.

Lord Hale says, the advantage of this latter kind of bail, is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause; and may re seize him if they doubt his escape, and have him committed, and so be discharged of the recognizance.

Barratry.

I. What it is.

II. How punished.

I. What it is.

Barratry, what. **T**HIS word *barratry* we have received either from the Danes or Normans, or both: for *baratta* in the Danish, and *baret* in the Norman, do equally signify a quarrel or contention.

And

And a *barrator*, in legal acceptation, doth signify a *common mover, exciter, or maintainer of suits or quarrels, either in courts, or in the country*, 1 Inst. 361. 1 Haw. 248.

A common mover] It seems clear, that no one can be a barrator in respect of one act only; for every indictment for such crime must charge the defendant with being a *common barrator*. 1 Haw. 243, 4. A common mover.

Mover, exciter, or maintainer] Yet it seemeth, that an attorney is in no danger of being judged guilty of an act of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. 1 Haw. 243. Or maintainer.

Also, it hath been holden, that a man shall not be adjudged a barrator, in respect of any number of false actions brought by him in his own right: for in such cases he is liable to costs. 1 Haw. 243.

In courts] Either courts of record; or not of record, as in the county, hundred, or other inferior courts. 1 Inst. 368. In courts.

Or in the country] In three manners: 1. In disturbance of the peace. 2. Or in the country. In taking or keeping of possessions of lands in controversy, not only by force, but also by subtilty and deceit, and most commonly in suppression of truth and right. 3. By false inventions, and sowing of calumniations, rumors, and reports, whereby discord and disquiet may grow between neighbours. 1 Inst. 368. try.

II. How punished.

By the *Eng. stat. 34 Ed. 3. c. 1. The justices of the peace shall have power to restrain all barrators, and to pursue, arrest, take, and chastise them, according to their trespasss or offence.* Punishment by statute.

And altho' this statute doth not create the offence, but supposes it at common law, and only appoints the punishment, yet an indictment of barratry, concluding *against the form of the statute*, is holden to be good, and agreeable to many precedents. *Cro. Eliz. 148. 1 Haw. 244.*

But it hath been resolved, that such indictment is not good, without also concluding *against the peace*; for this is an essential part of it, as being an offence by the common law. 1 Haw. 244. An offence at common law.

And it hath been holden, that an indictment of this kind may be good, without alledging the offence at any certain *place*; because from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, that a trial ought to be by a jury from the body of the county. 1 Haw. 244.

Which case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without shewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common General indictment good.

Barratry.

common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances; and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. 1 *Haw.* 244. 2 *Haw.* 226, 7.

Fine and imprisonment.

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, that he ought also to be farther punished, by being disabled to practice for the future. 1 *Haw.* 244.

Warrant for a barrator.

County of Dublin. } To the constable of——

WHEREAS complaint upon oath hath been made unto——one of his majesty's justices of the peace in and for the said county, that A. O. of——in the said county, yeoman, on the——day of——in the——year of the reign of——and on divers other days and times as well before as afterwards, at——aforesaid in the county aforesaid, and at divers other places within the county aforesaid was and yet is a common barrator, and daily disturber of the peace of our sovereign lord the king, and also a common brawler, wrangler, fighter, scandalizer, and sower of seditions, suits, and discords between his neighbours, and other the liege people and subjects of our said sovereign lord the king, to the great damage and disturbance of the said liege people and subjects of our said lord the king, and against the peace of our said lord the king, and to the evil example of all others in the like case offending: These are therefore to command you forthwith to bring the said A. O. before me to answer unto the said complaint, and to find sureties for his personal appearance at the next general quarter sessions of the peace to be holden for the said county, then and there to answer unto an indictment on the behalf of our said sovereign lord the king, to be preferred against him for the said offences. Hereof fail not upon the peril that shall ensue thereon. Given under my hand and seal the——day of——.

Bastards.

- I. Who shall be deemed a bastard.
- II. Murdering a bastard child.
- III. Capacity of a bastard child as to inheritance.

I. Who shall be deemed a bastard.

Derivation.

1. **T**HE word *bastard* seemeth to have been brought unto us by the Saxons; and to be compounded of *base*, vile or ignoble, and *starr*, or *stort*, signifying a rise or original. By the common people in the north (amongst

mongst whom is preserved much of the ancient *Saxon*) it is still pronounced *bastard*, denoting a person sprung from a vile or spurious origin; even as an *upstart* is a person suddenly risen from a mean extraction in general.

2. Lord *Coke* says, We term all by the name of bastards that are born out of lawful marriage. By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of *England*, if the wife hath issue, no proof is to be admitted to prove the child a bastard, unless the husband hath an apparent *impossibility* of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244. Who are bastards.

M. 6 G. 2. Lomax and Holmden. In ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, esquire, deceased; which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an *impossibility*, but an *improbability* only; that was not thought sufficient, and there was a verdict for the plaintiff. *Str.* 940. Inability to procreate.

And it is said, that formerly if the husband was within the four seas, no proof of *non-access* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now intirely departed from; and though the husband and wife are both in *England*, if there is sufficient proof that he had no access to her, the child will be a bastard. And this was determined in the case of *Pendrell and Pendrell*, *M. 5 G. 2.* which was an issue out of chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by court and council, on the trial at *Guildhall* before Lord Ch. J. *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced in the determination. *Str.* 925. *Andr.* 9. Husband within the four seas.

And, *M. 10 W. K. and Abberton.* The case was, a feme covert, during the absence of her husband at *Cadiz*, was brought to bed of a bastard; and her husband was not in *England* from the time of her conception, till she was brought to bed. The question was, whether this child was a bastard, especially within the words of the statute which saith, *children begotten and born out of lawful matrimony*; which cannot be said of this case, the mother being married at the time of the birth of the child; and if such a mother should kill such a child, she could not be guilty of murder within the statute of the

Bastards.

6 *Ann. c. 4.* But by the court; He is a bastard who is begotten and born of a feme covert, whilst the husband is beyond the four seas. And in a real action, if general bastardy was pleaded, the bishop ought to certify such a one a bastard. And where a man is a bastard, he is such to all purposes. *L. Raym.* 395, 396.

Child born during a divorce.

4. *M. 5 An. St. George's and St. Margaret's Westminster.* Where a woman is separated from her husband by a divorce *a mensa & thoro*, the children she has during the separation are bastards; for a due obedience to the sentence shall be intended, unless the contrary be shewed: but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended. But if a special verdict find the man had no access, it is a bastard; and so was the opinion of lord *Hale*, in the case of *Dickens and Collins.* 1 *Salk.* 123.

Widow having a child after her husband's death.

5. The law hath appointed no exact certain time, for the birth of legitimate issue, by the widow after the death of her husband. 1 *Danv.* 726.

M. 7 J. Alsop and Bowtrell. The question was, whether, the woman being delivered of a child forty weeks and nine days after the death of her husband, such child should be deemed a bastard. And it was proved, that her deceased husband's father did much abuse her, and caused her to lie in the streets; and three physicians (two of them being doctors of physick) made oath, that the child came in time convenient to be the child of the party who died; and that the usual time for a woman to go with child, is nine months and ten days, to wit, solar months, at thirty days to the month, and not lunar months; and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months or more. And the physicians further affirmed, that a perfect birth may be at seven months, according to the strength of the mother or child, which is as long before the time of the proper birth. And by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. And the child was adjudged to be legitimate. *Cro. Ja.* 541.

Perfect birth at seven months.

II. Murdering a bastard child.

Murdering a bastard child.

1. By 6 *Ann. cap. 4.* If any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other ways, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness at the least, that the child was born dead.

Concealment.

And it hath been adjudged, that in order to convict a woman by force of this statute, there is no need that the indictment be drawn specially, or conclude against the form of the statute; for the statute doth not make a new offence, but only make such concealment an undeniable evidence of murder. 2 *Haw.* 438.

Evidence of the murder.

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of

of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. 2 Haw. 438.

But it hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 Haw. 438.

Also, it hath been agreed, that if a woman confess herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 Haw. 438.

2. If a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. 1 H. H. 429, 30.

A Warrant to apprehend a Woman, on suspicion of having murdered her bastard child.

To the Constables of the parish of——.

County of } WHEREAS C. D. of——bath this day been before me,
——to wit, } and made information, upon oath, That A. B. of your
parish bath had a bastard child, lately born alive, of her body, and that the said
child is now dead; and the said A. B. is very much suspected to have murdered
the same: These are therefore, in his Majesty's name, to command you, that im-
mediately, upon sight hereof, you do apprehend and bring the said A. B. before
me, or some other justice of the peace of the said county, to answer to all such mat-
ters, as on the behalf of his Majesty, shall be objected against her touching the
premisses; and you are likewise hereby required to make the utmost search for dis-
covery of the truth of the premisses, and to bring before me, or some other justice
of the peace for this county, all such persons as can give any information therein: And hereof fail not at your perils. Given, and so forth.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manslaughter by the law of England, because it is not yet in *rerum natura*, nor can it legally be known, whether it were killed or not: So it is, if after such child were born alive, and after die of the stroke given to the mother, this is not homicide. 1 H. H. 433.

But if a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessory. 1 H. H. 433. But both are guilty of treason here.

III. Capacity of a bastard child as to inheritance.

A bastard may purchase.

A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name by reputation, he may purchase by his reputed name, to him and to his heirs; tho' he can have no heirs but of his body. 1 *Inst.* 3. 6 *Co.* 65.

What relations.

A bastard is *terminus a quo*; he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother, or sister, or the like. 3 *Salk.* 66.

Raising an use.

Consideration of natural affection will not raise an use to a bastard; for tho' there is natural affection between them, yet the raising the use is a constitution of the law, and therefore the use shall never arise. *Jenk.* 47. *Dyer*

Heir on the part of the mother.

374. If the issue of a bastard purchase land, and dies without issue: tho' the land cannot descend to any heir on the part of the father, yet to the heir on the part of the mother it may; so if the bastard was attainted: for the heirs of the part of the mother make not any conveyance by the bastard. *Noy* 159.

Beef.

I. Of the age of cattle to be slaughtered.

II. Of offences in slaughtering cattle.

III. Of packing beef for exportation.

I. Of the age of cattle to be slaughtered.

Cattle under the age of five years.

1. **B**Y the act 2 *Ann. cap.* 15. *sect.* 7. No merchant or other persons shall slaughter any oxen, cows, steers or heifers, to be salted, packed or barreled, by way of merchandise, to be transported under the age of five years, on pain of forfeiting of the same or the value thereof; the one moiety of which forfeiture to be to her Majesty, &c. the other moiety to him that will sue for the same in any court of record in Dublin by action, &c. in which no assign, &c. shall be allowed.

Forfeiture if intended to be transported.

2. If any person shall ship or procure to be conveyed in or to any ship or vessel upon the sea, or in any haven, river, creek or place within this kingdom, any beef salted, packed or barreled, that at the time of slaughtering thereof, was not of the age of five years, knowing the same to be under that age at the time of the killing thereof, to the intent to transport the same into any parts beyond the seas there to be uttered, every such person shall forfeit such beef so laden, shipped, or transported, contrary to this act, or the value thereof; the said forfeiture to be recovered in manner aforesaid.

Extreats of the forfeitures.

3. It shall be lawful for the justices of the peace of the several counties at their respective quarter-sessions, to hear and determine all the offences aforesaid,

said, and upon the convictions of such offenders before them, to make extracts of the one moiety of the said forfeitures into *the* exchequer, as had been used to be done in case of other fines and amercements, forfeited to her Majesty in the sessions of the peace, and to award and issue forth execution for the other moiety due by this act to the informer or prosecutor by *capias* or *feri facias* out of the said court of sessions, in such sort as the Queen's Bench at *Dublin* have in such cases used to do.

4. Provided that no person shall be sued for any offence against this act, unless such prosecution shall be begun within six kalendar months next after the offence committed. Prosecution in six months.

5. If upon any prosecution grounded upon this act, it shall appear to the judges or justices of the peace, before whom such information shall be presented, that such information or prosecution was promoted only for vexation, and without any reasonable cause, the said judges or justices of the peace shall award the party so unjustly prosecuted treble costs, occasioned by such vexatious prosecution, the same to be recovered by *capias* or *feri facias*. Treble costs for vexatious prosecutions.

6. If any *English* information or bill shall be brought against any person offending contrary to this act, such persons shall put in their answers to such information or bill on their corporal oaths; and no plea or demurrer unto such information shall be allowed, in respect of the penalty of this act which such answers may subject such persons unto. Bills to be answered.

7. If any suit shall be prosecuted against any persons for whatever they shall do in pursuance of this act, such persons may plead the general issue, and if the prosecutor shall become nonsuit or forbear further prosecution, or suffer a discontinuance, or if a verdict shall pass against him, the defendants shall recover their treble costs. General issue.

This statute is made perpetual by Stat. 9 Ann. cap. 7.

8. And by the act 2 Geo. 1. cap. 16. sect. 11. No person who shall slaughter any beef or black cattle in order to be exported, shall slaughter any bullock or steer during that season, which shall not be in the fifth year of his age at least, at the time of slaughtering, or shall bring or suffer to be brought into his slaughter-house or yard, any bullock or steer which shall not be in the fifth year of his age during that season. Age of cattle for slaughter.

9. And if any person shall offend herein, and be thereof convicted by the oath of one credible witness, before any justice of the peace of any county or city, or chief magistrate of any corporation where such offence shall be committed, every person so offending shall forfeit five pounds for every such bullock or steer so brought into the yard or slaughter-house, or slaughtered as aforesaid, to the person who shall inform for the same, which sum shall be levied by sale or distress of the offenders goods, and paid to the informer. Penalty for offences.

10. And in case a sufficient distress cannot be found, every person so convicted, shall be three times publicly whipt through the town where such offence is committed, and the carcass of every beast slaughtered or brought to be slaughtered as aforesaid, shall be distributed among the poor of the parish where the offence was committed, according to the direction of the chief magistrate or justice before whom the conviction shall be. Want of distress.

11. And it shall be lawful for any person, upon information given before any justice of the peace or chief magistrate of any city or town corporate, Warrant for search.
by

by virtue of his or their warrant, to search the yard or slaughter-house of any person against whom such information shall be given.

II. Of offences in slaughtering cattle.

Cods and shifts.

1. By the act 9 *Ann. cap. 7. sect. 1.* Every butcher or person employed by them, who shall slaughter any cattle to be packed by way of merchandise to be transported, shall leave the cods and shifts with such cattle, and not cut the same way.

Forfeit twenty shillings.

2. And if any butcher or person employed by them as aforesaid, shall offend by cutting away the cods and shifts from any such cattle, they so offending and being convict upon oath of the said offence, before one justice of the peace, or chief magistrate of any corporation, by one witness, or upon confession of the offenders before such justice or chief magistrate, the parties so offending shall forfeit for every such offence twenty shillings, to be levied by distress and sale of the offenders goods, the overplus to be restored after all charges of the said distress defrayed, the one moiety thereof to be to the party informing, and the other moiety to the use of the poor of the parish where such offence shall be committed.

Constables to levy.

3. And every constable of the parish or chief constable of the barony where such offence shall be committed, are required to levy the same accordingly, by warrant under the hand and seal of such justice or chief magistrate.

Want of distress.

4. And in case such offenders shall not have goods sufficient for the levying of the said penalty, it shall and may be lawful for the justice or chief magistrate before whom such conviction shall be made, by warrant under their hand and seal, to appoint such offenders to be publickly whipt through such corporation or next market-town, on the next market-day immediately following.

III. Of packing beef for exportation.

Casks for packing beef.

1. By the act 2 *Ann. cap. 15.* Every barrel of beef which shall be salted and packed up by way of merchandise to be transported, shall contain at the least two hundred weight of net beef, at one hundred and twelve pounds to the hundred, upon pain of forfeiture of every barrel of beef that shall be found packed up and ready for exportation, that doth not contain two hundred weight of net beef as aforesaid, in whose hand soever the same is found. The said forfeiture to be recovered as aforesaid. *sect. 9.*

Gauge of casks.

2. And by the act 8 *Geo. 1. cap. 7. sect. 18.* In case any persons shall barrel up beef, with intent to export or sell the same, in any half barrel which shall be in gauge under fourteen gallons and a half, or above fifteen gallons, or in any whole barrel in gauge under twenty-nine gallons, or above thirty gallons.

Barrels for pork.

3. Or in case any persons shall barrel up pork with intent to export or sell the same, in any barrel which shall contain less than two hundred weight net, or in any half barrel which shall contain less than one hundred weight net, or in any barrels, which shall not be severally marked with the coopers, merchants, or other persons name who shall make or save such pork or beef, such

such persons so offending shall forfeit for each barrel of pork or beef so packed up, ten shillings, to be recovered in such manner and applied to such uses as herein after are directed.

4. If any coopers shall make any barrel or half barrel for packing of ^{Coopers.} beef or pork, other than according to the aforesaid gauge and contents, such coopers shall forfeit twenty shillings for every barrel or half barrel which shall be made contrary to this act, to be paid to the informer, and to be recovered in the same manner as the other penalties by this act are recoverable.

5. It shall be lawful to seize and detain all persons and their goods which ^{Seizing goods.} shall be made up packed or bought and sold contrary to this act, for such reasonable time as they may give notice to the constables of the parish where such persons or their goods shall be so seized, who are required to carry such persons and their goods before the chief magistrate of the city or town corporate, or before some justice of the peace where such offence shall be committed, if in no city or town corporate.

6. Which said magistrates or justices are required either upon the confession of the party offending, or due proof by one witness upon oath, that the person so brought before them hath offended contrary to this act, by warrant under their hands and seals, to cause such penalties as the offenders are hereby liable to, to be forthwith levied by distress and sale of the offenders goods, rendering the overplus, if any be, to the owners thereof, after deduction of the reasonable charges for taking the said distress, and out of the said distress, to pay the said respective penalties and forfeitures to the informer. ^{Penalties to be levied.}

7. And in case such offenders shall not have goods sufficient to answer the ^{Want of distress.} said penalties, such offenders by warrant under the hand and seal of such magistrate or justice of the peace, shall be publickly whipt three market-days successively through some market-town in the county, in or near such place where the offence was committed, between the hours of eleven and twelve in the forenoon.

The foregoing clauses of this act are continued by Stat. 10 Geo. 1. cap. 9. and by Stat. 21 Geo. 2. cap. 7. until the 29th of Sept. 1769, and to the end of the then next session, &c.

Beer-Vessels.

1. **B**Y the act 9 Geo. 2. cap. 9. sect. 1. If any publick brewer shall sell or ^{Gauge of vessels.} expose to sale, any beer, ale, or small-beer, in any half-barrel in gauge under twenty gallons, or in any whole barrel in gauge under forty gallons, each gallon containing two hundred and seventeen cubical inches, and six tenths of an inch, or shall not brand their christian name and surname at length on the head of each barrel or half-barrel, every such publick brewer being thereof convicted, either upon his own confession, or by the oath of one credible witness, before any chief magistrate or justice of the peace of any town corporate, or county where the said offence shall be committed, shall forfeit for every barrel or half-barrel under the gauge or not ^{Penalty.} branded

Beer-Vessels.

branded, two shillings and six-pence, and such barrel or half-barrel shall be burnt by order of such chief magistrate or justice, before whom such conviction shall be.

Distress and
sale.

2. And such chief magistrate or justice shall by warrant under their hands and seals, cause such penalties as the offenders are hereby liable to, to be levied by distress and sale of the offenders good, and thereout pay the said penalties to the informers, and render the overplus, after deduction of the reasonable charges, not exceeding two shillings, of taking the distress, to the owners.

Coopers.

3. If any cooper shall sell to any publick brewer, any barrels or half-barrels under the gauges aforesaid, or shall not brand his christian name and surname at length upon the head of every such barrel and half-barrel, every such cooper shall for every barrel or half-barrel, so sold under the gauge or not branded as aforesaid, forfeit two shillings and six-pence, to be recovered, levied, and applied, as the penalties before-mentioned are directed to be levied and applied.

Information in
six days.

4. No person shall be liable to or incur the penalties inflicted by this act, unless information be given upon oath before such chief magistrate or justice of the peace, within six days next after such offence committed.

A Warrant to levy the forfeiture on brewers, for selling beer, &c. in barrels, &c. under gauge, &c.

To the constable of——.

County of } **F**ORASMUCH as it hath been duly proved before me this
——to wit, } day, on the oath of A. B. of C. in the county aforesaid, labourer, that C. D. of C. aforesaid, a publick brewer, did, on the third day of this instant May, at C. aforesaid, in the county aforesaid, sell four barrels of beer, in barrels, under the gauge which the law directs, (or in barrels which were not branded with his or her christian name and surname at length, on the head of each barrel) whereby he hath forfeited the sum of two shillings and six-pence for every such barrel, wherefore the forfeiture, in the whole, comes to ten shillings: These are therefore, in his Majesty's name, to command and require you, forthwith to levy the said sum of ten shillings of the goods of the said C. D. by distress and sale thereof, rendering him the overplus, if any be, after deducting two shillings, charges of taking the said distress; and that you pay the said sum of ten shillings to the said A. B. who informed me of the said offence; and farther, that you burn each of the said barrels: Hereof fail not. Given under my hand and seal, this fourth day of May, 17—.

F. G. [seal]

The like warrant, *mutatis mutandis*, will serve for levying the forfeiture on coopers, for selling barrels, &c. under gauge, or not branded, as aforesaid.

AS *bigamy* in our law seems for the most part to be used to signify the *Polygamy*. having of two wives successively one after the other, I shall take the liberty to transfer the offence which is commonly treated of under this title unto the title **Polygamy**, which signifies more properly the having two or more wives or husbands at the same time.

Blasphemy and Profaneness.

1. **A**L L blasphemies against God, as denying his being or providence; *Blasphemy* and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scriptures, or exposing any part of them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous—are punishable by fine and imprisonment, and also such corporal punishment as to the court shall seem meet, according to the heinousness of the crime. 1 *Haw.*

6, 7.

2. Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 *Haw.* 7. *Depraving the established religion.*

3. No person shall have any benefit of the toleration act, who shall deny in his preaching or writing, the doctrine of the Blessed Trinity, as it is set forth in the 39 articles. 1 *W. sess.* 1. c. 18. s. 17. *Denying the Trinity.*

6. *M.* 1 *G.* 2. *K.* and *Curl.* An information was exhibited by the attorney general, against *Edmund Curl*, for printing and publishing (*obscænum libellum*) an obscene book, called *Venus in the Cloister*, or *the Nun in her Smock*, setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners; yet it cannot be a libel, for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was a temporal offence; and the defendant was set in the pillory. *Str.* 788. *Case of Edmund Curl.*

7. *E.* 2 *G.* 2. *K.* and *Woolston.* He was convicted on four informations, for his blasphemous discourses on the miracles of our saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against christianity *in general* was not an offence punishable in the temporal courts at common law: They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up, and fined 25*l.* for each of his four discourses. to suffer a year's imprisonment, and to enter into a cognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others. *Str.* 834. *Case of Thomas Woolston.*

8. In the year 1656, *James Nayler*, for personating our Saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced. *Case of James Nayler.*

L

tenced

Blasphemy and Profaneness.

tenced to be set in the pillory, and to have his tongue bored thro' with a red hot iron, and to be whipped, and stigmatized in the forehead with the letter B.

For profane cursing and swearing, see title **Swearing**.

Bread.

Bread, acts expired.

The several statutes for regulating the price and assize of Bread, &c. are now expired; the acts 11 Geo. 2. cap. 11. and 19. Geo. 2. cap. 17. so far as the same related to regulating the price and assize of Bread, and the better regulating the markets were revived and continued from the first of May, 1756, for two years, &c. but they have not been further continued.

Bribery.

Bribery, what.

B R I B E R Y in a strict sense is taken for a great misprision of one in a judicial place, taking any thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law by fine and imprisonment. 1 *Haw. c. 67.*

Bricks.

Digging clay.

B Y the act of 3 *Geo. 2. cap. 14.* Every person who shall make or cause to be made bricks for publick sale, or shall expose such bricks when made to public sale in any parts of this kingdom, shall be obliged to dig and turn such clay before the month of *November* next, preceding the burning of such bricks.

Tempering.

And in so doing shall fairly and cleanly uncaloe or strip the upper soil from such brick-earth as they shall make use of, and shall not make use of any other than the proper and natural brick-earth, and shall also be obliged to turn and temper the clay once more after the month of *November*, and before the month of *February* next preceding the burning of such bricks.

Time and manner of moulding.

And also, that no persons employed in brick-making, shall in any way mould any clay which has not first been tempered and turned in manner as is herein before-mentioned, and picked clear of stones of any kind particularly lime-stones, or shall on any pretence whatsoever mould into brick any clay wherein there is any lime-wash, or mould any bricks after the twenty-fifth day of *November* in any year, and before the twenty-fifth day of *March* following.

Size of bricks.

All bricks which shall be made or burnt for sale, shall, when burnt, be not less than nine inches and a half long, four inches and a half broad, and two inches and a quarter thick.

And

And no person in moulding bricks pursuant to this act, shall mould any clay as it is delivered to them, unless it be of such a consistence that it will stick together if taken up with a common pitch-fork of two tangs. Consistence of the clay.

And no person employed in brick-making, shall mould or burn any bricks in any other time of the year than between the first day of *March* and first day of *November*, unless such bricks be for the proper and private use of the persons so making or burning the same, and not for public sale or to be used in any of the edifices or buildings of the city of *Dublin*, or any corporate town or city. *sect. 14.* Time of burning bricks.

If any persons shall make any bricks for sale in any other manner than is herein before directed, upon complaint made thereof before two justices of the peace within their respective jurisdictions, such justices are required to summon the persons so complained of to appear before them, and upon the appearance, or default of the persons so complained of, and due proof of such offence by the oath of one credible witness, to convict such offenders and adjudge that they shall forfeit twenty shillings *sterling per thousand*, and so proportionably for a greater or lesser quantity of bricks as shall be so made for sale contrary to this act, one half thereof to be given to the first informer, and the other to the poor of the parish. Penalty for offences.

The same to be levied by warrant, under the hands and seals of any two justices of the peace within their respective jurisdictions, by distress and sale of the offenders goods, rendering the overplus to the owner. Levied by warrant.

And for want of sufficient distress such justices are required to commit the persons so offending to the common goal of the place where such offence shall be committed, there to remain without bail or mainprize for any term not exceeding three months. Want of distress.

If any persons shall think themselves aggrieved by such distress, sale, or imprisonment, they may appeal to the next general quarter-sessions of the peace to be holden for the place where such distress, sale, or imprisonment was made, who are impowered to hear and finally determine the same, and to award such costs to the party who shall appear to be aggrieved by such appeal as they shall think reasonable. *sect. 16.* Appeal to the sessions.

A Summons to a brick-maker for making bricks contrary to
3 Geo. 2. cap. 14.

To E. F. of——.

County of }
——to wit, } **W**HEREAS A. B. of C. in the county aforesaid, labourer, hath made complaint upon oath unto us C. D. and G. H. esquires, two of his Majesty's justices of the peace, for the said county, that you have lately at C. in the county aforesaid, made two thousand bricks for sale, contrary to the directions of the statute in that case made and provided: These are therefore to summons you to appear before us, at the house of I. K. known by the sign of the ——, in the town of L. in the county aforesaid, on —— next, being the tenth day of this instant August, by ten of the clock in the forenoon of the same day, to answer the premisses. Given under our hands and seals, this seventh day of August, 17——.

C. D. [Seal]
D. H. [Seal]

A Warrant to levy the forfeiture.

To the constable of———and to the goaler of K.

County of } **F**ORASMUCH as it hath been duly proved before us
 —to wit, } this day, on the oath of A. B. of C. in the county aforesaid,
 labourer, that E. F. of C. aforesaid, brick-maker, did lately at C. aforesaid in
 the said county, make four thousand bricks for sale, contrary to the directions of
 the statute, made in this kingdom, in the third year of the reign of his present
 Majesty King George the Second, whereby he hath forfeited the sum of twenty
 shillings for each thousand of the said bricks; wherefore the said forfeiture comes
 in the whole to the sum of eighty shillings: These are therefore in his Majesty's
 name, to command and require you forthwith to levy the said sum of eighty shil-
 lings, by distress and sale of the goods and chattels of the said E. F. returning
 to him the overplus, if any be, and that you pay one half of the money, so levied,
 to the said A. B. who informed us of the said offence, and the other half to the
 church-wardens of the parish of C. aforesaid, within which the said offence was
 committed, to the use of the poor of the said parish; and if no sufficient distress
 can be had, you are to take and apprehend the said E. F. and deliver him safely
 to the keeper of his Majesty's goal, at K. in the county aforesaid, to be
 there kept without bail or mainprise, for the space of three months from the
 date hereof: And you the said keeper are hereby required to receive the said
 E. F. and keep him safely in your custody during that time. Hereof fail not.
 Given under our hands and seals at L. in the county aforesaid, this tenth day of
 August, 17—

C. D. [Seal]
 G. H. [Seal]

Note, An appeal lies to the next quarter-sessions, and then a conviction must
 be drawn up in form thus:

County of { **W**HEREAS complaint was made unto us C. D. and
 —to wit, { G. H. esquires, two of his Majesty's justices of the peace,
 for the county aforesaid, upon the oath of A. B. of C. in the county aforesaid,
 labourer, that E. F. of C. aforesaid, brick-maker, did on the first day of this
 instant August, at C. aforesaid, make four thousand bricks for sale, contrary
 to the form of the statute made in this kingdom, in the third year of the
 reign of his present Majesty King George the Second; and it having also been
 proved before us this day upon oath, that the said E. F. was duly served with a
 summons to appear before us this day, to answer the premisses, and he having ne-
 glected to appear, we proceeded this present day to hear the said matter; and it
 being duly proved before us, upon the oath of the said A. B. that the said E. F.
 is guilty of the said offence: Therefore we do hereby convict the said E. F. of the
 said offence, and do hereby adjudge that he the said E. F. by virtue of the said
 statute, hath forfeited twenty shillings for each thousand of the said bricks, and
 so forth [as in the next foregoing warrant].

NOTE;

NOTE; This title treateth only of county bridges: Those which are under the cognizance of the surveyor of the highways, as being repaired by the several parishes or districts, are treated of under the title **highways**.

I. Who shall repair.

II. Power of the leet to inquire thereof.

III. Power of the justices in sessions.

IV. Indictment for not repairing a bridge.

V. Charges of repairing.

VI. Surveyors of work.

VII. Manner of repairing.

I. Who shall repair.

1. By the great charter, 9 H. 3. c. 15. *No town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have ta.* *Magna char- been accustomed.*

2. And none can be compelled to make new bridges, where never any were before, but by act of parliament. 2 Inst. 701. *By statute.*

3. By the common law, some persons (spiritual or temporal, corporate or not corporate) are bound to repair bridges by reason of the *tenure* of their lands or tenements; and some by reason of *prescription* only: *By tenure.*

By *tenure*, by reason that they and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same.

2 Inst. 700.

By reason of *prescription* only; but herein there is a diversity between bodies politick or corporate, spiritual or temporal, and natural persons: for the bodies politick or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local, and have a succession perpetual; but a natural person cannot be bound by act of his ancestor, without alien, or binding, and assets. 2 Inst. 700. *By prescription.*

And if a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription. 2 Inst. 701. *Repairs.*

4. And if none are bounden by tenure or prescription at common law, then the whole county or franchise shall repair it. 2 Inst. 701. *The county.*

It is enacted by the 10 Car. 1 sess. 2. cap. 26. as follows: *Whereas in many places it cannot be known and proved, what hundred, town, parish, person, or body politick ought to repair bridges broken in the highways; in every such case, the said bridges, if they be without a city or town corporate, shall be made by the inhabitants of the county; if within a city or town corporate, then by the inhabitants of such city or town corporate; if part be in one shire, city or town corporate, and part in another, or part within the limits of a city or town corporate, and part without, the inhabitants of the shires, rites, or towns corporate shall repair such part as lies within their limits.* 1. 3. *The act, 10 Car. 1.*

Bridges

Common
bridges.

Bridges broken in the highways] This extendeth only to common bridges in the king's highways, and not to private bridges to mills, or the like; the remedy in which case is not by indictment, but by action. 2 *Inst.* 701.

Towns corpo-
rate.

Within a city or town corporate] It hath been questioned, whether a borough which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 *Haw.* 225.

House adjoin-
ing to a bridge.

5. A tenant at will of an house, which adjoins to a common bridge, is bound to repair the house, so that the publick be not prejudiced by the want of repair, although he be not bound to repair as to his landlord. L. *Raym.* 856.

Freehold of
bridges.

6. The freehold of bridges is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. 2 *Inst.* 705.

II. Power of the leet to inquire thereof.

Presentable in
the leet.

Decays of bridges are presentable in the leet, or torn. 2 *Inst.* 701.

III. Power of the justices in sessions.

The act, 10
Car. 1.

By the 10 Car. 1 sess. 2. cap. 26. The justices shall have power to inquire, hear and determine in the general sessions, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment, against such as ought to be charged to make or amend them, as the king's bench usually doth, or as it shall seem by their discretions to be necessary and convenient, for the speedy amendment of such bridges.

King's bench.

As the king's bench usually doth] The presentment at common law, might be before the king's bench, or at the assizes. 2 *Inst.* 701.

IV. Indictment for not repairing a bridge.

Indictment.

1. An indictment for not repairing a bridge, ought to shew what sort of a bridge it is, whether for carts and carriages, or for horses, or for footmen only. L. *Raym.* 1175.

2. If a man be indicted for that by reason of the tenure of certain lands he is bound to repair a bridge, it must be alledged where those lands lie. 2 *H. H.* 181.

Defendant.

3. Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court, for the default of repairs, and shall be put to his remedy at law for a contribution from those, who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest expedition in cases of this nature. 1 *Haw.* 221.

4. It

4. It hath been resolved, that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves, by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said, that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea. 1 Haw. 221. Plea to excuse

V. Charges of repairing.

1. By the 10 Car. 1. sess. 2. c. 26. The justices of assise in their circuits and the justices of peace in the quarter-sessions with the assent of the grand jury, shall have power to tax every inhabitant in any such county, barony, city, borough, town, or parish within the limits of their commissions, to such reasonable aid and sum of money as they shall think sufficient for the new building and repairing such bridges, causeys, and toghers, [and after such taxations made, the justices of assise and justices of peace shall cause the names and sums of every person so by them taxed to be written in a roll indented, and shall make two collectors of every barony, city, borough, town, or parish for collection of all such sums of money by them taxed,] which collectors receiving the one part of the said roll indented under the seals of the said justices, shall have authority to collect all the particular sums of money therein contained, and to distrain every such inhabitant as shall be taxed and refuse payment thereof in his lands, goods, and chattels, and to sell such distress, and of the sale thereof retain the money taxed and the residue to deliver to the owner thereof. Taxing the inhabitants.
Collectors.
Distress.

2 But by the act. 1 Geo. 2. c. 13. sect. 16. No money shall be raised on any county or barony, upon any presentment to be made at any general quarter-sessions to be held for any county, except for the county of *Dublin* and the county of the city of *Dublin*, but for the uses of the houses of correction and the keepers thereof. No money to be raised at sessions.

3. And by the 6 Geo. 1. cap. 10. sect. 7. No money shall be raised by the presentment of any grand jury, for the building or repairing bridges, or for the repair of any publick road, unless there be an affidavit made by two credible persons who live in the neighbourhood and have viewed such bridge or place for a bridge or high-road, that the same is wanting or out of repair, and unless the number of perches of such high-road which wants repair be ascertained in such affidavit. Affidavit before presentment.

And no such presentment shall be allowed by any judges of assise or by the justices of the peace at the general quarter-sessions for the county of *Dublin*, unless such affidavit be thereunto annexed, which presentment and affidavit the clerk of the crown or peace of each county is required to file and keep among the records of the said county. Sect. 8. Annexed to the presentment.

The overseers named in such presentments shall before the next judges of assise, and in the county of *Dublin* before the justices of the peace, after the money presented or any part thereof shall appear to be collected, account upon oath how the same has been applied; [and if it shall appear that the money so given has not been laid out to the purposes for which the same was appointed, it shall be lawful for the judges of assise in the several counties wherein such presentment was made, and in the county of *Dublin* for the justices Overseers to account.
Order for payment.

Committal for neglect.

justices of the peace at the quarter-sessions to be held for the said county, to order the persons who shall have received any part of such sums to pay the same to the treasurer] and in case of neglect or refusal to commit such persons to the gaol of the said county, there to remain in execution until they shall have paid what they shall have so received. *Sett.* 9.

This act is made perpetual as to the above clauses by Stat. 10 Geo. 1 cap. 3.

Bridges damaged,

Two justices,

Affidavit.

Presentment.

Five pounds for any one bridge.

4. And by the 1 Geo. 2. c. 3. *sect.* 1. When any bridge which ought to be repaired by any county shall be damaged or out of repair, and it shall appear by affidavit made before two justices of the peace, and subscribed by two credible persons who live in the neighbourhood and have viewed such bridge, that the said damage has happened after the then last assises, and if the bridge be in the county of *Dublin* after the then last quarter-sessions, and that the repair of the said bridge cannot be delayed to the then next assises or quarter-sessions respectively without prejudice to the county, it shall be lawful for any two justices of the peace of the county where such bridge is, each having an estate of freehold in lands tenements or hereditaments of the clear yearly value of one hundred pounds at least within the said county, by warrant under their hands and seals, to appoint any sum not exceeding five pounds at any one time to be laid out for the repair of any one such bridge, and proper persons to repair the same; and upon producing such affidavit and the said warrant, and also an affidavit taken before the judge of assise or any justice of the peace for the county of *Dublin*, of the persons who shall be so appointed to repair such bridges, that the same have been sufficiently repaired, and the money appointed for that purpose as aforesaid truly laid out on the same, before the grand-jury of the said county at the then next assises to be held for the said county, and before the grand-jury of the county of *Dublin* at the then next quarter-sessions, the said grand-juries are required to make presentments, which the judges of assise and justices of the peace in the said county of *Dublin* at the quarter-sessions before whom the same shall be made are required to confirm, for the raising such money as shall be so appointed, and shall appear upon oath to have been laid out for the repairing of such bridges, to be paid to such persons who shall have done the said work or laid out the money for the doing thereof.

Provided that no more than five pounds shall be raised, at the same assise or quarter-sessions for the county of *Dublin* respectively, for the repairing any one bridge as aforesaid. *Sett.* 2.

This act is continued by Stat. 29 Geo. 2. cap. 8. sect. 8. to the end of that session, and for sixteen years, from the expiration of the then next session.

VI. Surveyors of the work.

Surveyors of bridges.

By the 10 Car. 1. *sess.* 2. cap. 26. The justices of assise and justices of the peace within the limits of their commissions, shall name and appoint two surveyors, which shall see every such bridge, causeway, and togher builded and repaired as often as need shall require, to whose hands the said collectors shall pay the said sums of money taxed, and by them received. *Sett.* 4.

And

And the collectors and surveyors and the executors and administrators of every of them from time to time, shall at the publick sessions of the peace make a true account to the justices of the peace of the shire, city, or town corporate, wherein they shall be appointed collectors or surveyors, of the receipts, payments, and expences of the said sums of money; and if any of them refuse that to do, the justices of the peace by their discretions, shall make process against the said collectors and surveyors and every of them their executors and administrators, by attachments under their seals returnable at the general sessions of the peace; and if they appear then to compel them to account, or else if any of them refuse then to commit such of them as shall refuse to ward, there to remain with bail or mainprize 'till the said declaration and account be truly made.

Account of money.

Refusal to account.

VII. Manner of repairing.

1. It seemeth to be clear, that those who are bound to repair bridges, must make them of such height and strength, as shall be answerable to the course of the water, whether it continue in the old channel, or make a new one. 1 Haw. 221.

Manner of repairing.

2. And persons are not trespassers, for entring on any adjoining land for repairing bridges, or laying thereon the requisite materials. 1 Haw. 221.

Adjoining lands.

Indictment for a bridge out of repair.

BY the oaths of ——— good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the king, and the body of the county aforesaid, it is presented, that a certain common bridge, over the river ——— commonly called ——— bridge, lying and being in the parish of ——— in the county aforesaid, in the king's common highway there, leading from the market town of ——— to the market town of ——— in the said county, altogether and from the time whereof the memory of man is not to the contrary, being a common king's highway for all the lieges and subjects of our said lord the king and of his ancestors, with their horses, carts, and carriages to go, pass, ride, and travel at their pleasure, on the ——— day of ——— in the year of the reign of ——— was, and yet is in great decay, broken and ruinous, so that the lieges and subjects of our said lord the king, upon and over the said bridge with their horses, carts, and carriages could not and cannot go, pass, ride, and travel, without great danger, to the grievous damage and nuisance of all the lieges and subjects of our said lord the king, upon and over the same bridge going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity.

And that A. O. late of ——— in the said county, gentleman, by reason of his tenure of certain lands lying in the parish of ——— aforesaid, and elsewhere in the said county, ought to make, repair, and amend the said common bridge, as often as and when it shall be necessary.

[Or, And that the inhabitants of the county aforesaid, the common bridge aforesaid (so as aforesaid being in decay) ought to repair and amend, when, and so often as it shall be necessary.]

Bridges.

A Warrant for repairing a Bridge suddenly decayed.

To G. H. and I. K. of——.

County of Dub-
lin, to wit, } **W**HEREAS the bridge of A. in the county aforesaid, which ought to be repaired by the said county, is now damaged and out of repair; and it appears by affidavit made before us, A. B. and C. D. esquires, two of his Majesty's justices of the peace for the county aforesaid, and subscribed by E. F. and G. H. two credible persons who live in the neighbourhood of the said bridge, and have viewed the same, that the said damage has happened since the last quarter-sessions held for the said county, and that the repair of the said bridge cannot be delayed to the next quarter-sessions to be holden for the said county, without prejudice to the said county: We therefore, according to the statute in this case made, do hereby appoint the sum of five pounds to be laid out forthwith for the repair of the said bridge; and we do also hereby appoint you the said G. H. and I. K. to repair the same. Given under our hands and seals, (and so forth).

Buggery.

What it is.

1. **B**UGGERY (from the *Italian bugarone*, a buggerer, this vice being said to have been brought into *England* out of *Italy* by the *Lombards*) is a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast. 3 *Inst.* 58.

Felony.

2. And by the 10 *Car.* 2. *sess.* 2. *cap.* 20. The detestable vice of buggery committed with mankind or beast shall be adjudged felony, and such process therein be used as in cases of felony at the common law.

Without clergy

And the offenders being convicted by verdict, confession, or outlawry, shall suffer pains of death and losses of their goods, lands, &c. as felons; and no person offending in any such offence shall be admitted to his clergy.

And justices of peace shall have power to inquire of the said offence, as in other felonies.

Principal and accessory.

3. Which said statute making it felony generally, there may be accessaries both before and after, But those that are present, aiding and abetting, are all principals. And altho' none of the principals are admitted to their clergy, yet accessaries before and after are not excluded from clergy. 1 *H. H.* 670.

Infants.

4. If the party buggered be within the age of discretion (which is generally reckoned the age of 14) it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of discretion, it is felony in them both. 3 *Inst.* 59. 1 *H. H.* 670.

Buggery.

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5. By the articles of the navy (22 G. 2. c. 33.) if any person in the fleet Navy. shall commit the unnatural and detestable sin of buggery or sodomy with man or beast; he shall be punished with death by the sentence of a court martial.

Buildings.

BY the act of 3 Geo. 2. cap. 14. If any carter, carrman, loader, or persons concerned, shall deliver false or unusual measure, weight, or quantity, in bricks, lime, stone, or sand, (which usual weight, measure, and quantity, is declared to be in brick one hundred and twenty-five to the carr-load, in slack lime, sixty-four gallons to the hoghead, and in stones, five hundred weight to the carr-load) or any other materials necessary in building, or shall wilfully endeavour to impose a false account of any such delivery, on the persons to whom the same are to be delivered, and every such offender being thereof convicted upon the oath of one credible witness, before any justice of the peace within their jurisdictions, shall for every such offence forfeit twenty shillings, to be levied by distress and sale of the offenders goods, and for want of distress shall be committed to the house of correction, there to be kept to hard labour for any time not exceeding three months. *sect. 17.* False measure. False account. Forfeit 20 s.

If any workman shall lay or cause to be laid any piece of timber in any party-front or back-wall of any house within the city of *Dublin*, or within any other city or town, in such a manner that it shall appear through the same, or shall lay it within four inches of the out-side of the said wall, or shall build or repair from the foundation any brick or stone walls upon timber, so that the same shall bear or depend thereon, except what timber shall be necessary in securing foundations, or for making shop-windows and doors, such persons so offending, being thereof convicted upon the oath of one credible witness, before two justices of the peace within their respective jurisdictions, shall for every such offence forfeit five pounds, one half thereof to be given to the informer, and the other half to the poor of the parish, the same to be levied by distress and sale of the offenders goods, and for want of sufficient distress, shall be committed to the common gaol of the place, where such offence shall be committed, there to remain without bail or mainprize for the space of three months, or 'till such time as the said sum of five pounds shall be paid. *sect. 18.* Timber laid in walls. Building on timber. Forfeit five pounds.

Burials.

BY the act of 9 Will. 3. cap. 26. No person shall bury any dead in any suppressed monastery, abbey, or convent, not made use of for divine service, according to the liturgy of the church of *Ireland* by law established, or within the precincts thereof, upon pain of forfeiting ten pounds, which sum shall be recovered from any person present at such burial, and offending contrary to this act, which forfeitures justices of the peace in their counties are authorized to hear and determine; one moiety of which forfeiture. Burying in abbeys. Forfeit ten pounds.

Butrials.

feiture shall be by such justice given unto the informer, and the other moiety to the minister and church-wardens of the parish where such offences shall be committed, for the use of the parish. *sect. 6.*

Appeal to the
sessions.

Provided that if any person shall think themselves aggrieved by the judgment of such two justices of the peace, *they* may appeal to the next judges of assize, or to the justices of peace at the next general quarter-sessions, who are empowered to examine the matter and give relief therein. *sect. 7.*

Burglary.

Offences against the house of another, which fall short of Burglary, belong to title **Larceny**, under the head **Larceny from the House**.

I. What is Burglary.

II. Reward for convicting a burglar.

I. What is Burglary.

Derivation of
burglary.

Definition of
burglary.

Breaking a
house.

Opening a win-
dow or door.

Breaking a
cupboard.

1. **T**HE word *burglar* seemeth to have been brought unto us out of Germany by the Saxons, and to be derived of the German *burg*, a house, and *larron*, a thief, probably from the Latin *latro*, *latronis*.

2. Burglary is a felony at common law, in breaking and entering the mansion house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. Hale's Pl. 79.

—*Breaking*] Every entrance into the house by a trespasser, is not a breaking in this case; but there must be an actual breaking. As if the door of a mansion-house stand open, and the thief enter, this is no breaking. So it is if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 Inst. 64.

And lord Hale says, these acts amount to an actual breaking; opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 H. H. 552.

At a meeting of the judges upon a special verdict in January, 1690, they were divided upon the question, whether breaking open the door of a *cupboard* let into the wall of the house was burglary or no. Concerning which, Sir Michael Foster says, with regard to cupboards, presses, lockers, and other fixtures of the like kind: it seemeth that, in favour of life, a distinction ought to be made between cases relative to mere property, and such wherein life is concerned. In questions between the heir or devisee and the executor, those fixtures may with propriety enough be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, under whose bounty the executor claimeth, that

that they should be so considered; to the end that the house might remain to those, who by operation of law, or by his bequest, should become intitled to it, in the same plight he put it or should leave it, intire and undefaced. But in capital cases, it seemeth, that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use. *Fost.* 108, 9.

M. 8 G. K. and Gray. One of the *servants* in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. *Str.* 481.

Opening a door with intent to ravish.

By the statute of the 12 *Ann. c. 7.* If any person shall enter into the mansion-house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony and shall in the night time break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night time, with intent to commit felony.

Entering with intent to commit felony.

M. 4. G. 2. Joshua Cornwall's case. He was indicted with another person for burglary. And upon the evidence it appeared, that he was a servant in the house where the robbery was committed, and in the night time opened the street door, and let in the other prisoner, and shewed him the side-board, from whence the other prisoner took the plate: then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the servant, he not going out with the other. But afterwards at a meeting of all the judges at *Serjeants-inn*, they were all of opinion that it was burglary in both, and not to be distinguished from the case where one watches at the street end, whilst another goes in and commits the burglary which hath been often ruled to be burglary in both; and upon report of this opinion the defendant was executed. *Str.* 881.

Servant letting in a thief.

And entering] It is deemed an entry, when the thief breaketh the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, or into a hole of the house which he hath made, of intent to murder or kill; this is an entry and breaking of the house: but if he doth barely break the house, without any such entry at all, this is burglary. 3 *Inst.* 64.

Breaking a house without entering it.

In the case of *George Gibbons*, at the *Old Bayly* in *June, 1752*; *Gibbons* was indicted for burglary in the dwelling house of *John Allen*. It appeared in evidence, that the prisoner in the night time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling house; and putting his hand through the hole, took out watches and other things, which hung in the shop within his reach; but no entry was proved, otherwise than by putting his hand thro' the hole. This washeld to be burglary, and the prisoner was convicted. *Fost.* 107, 8.

Making a hole in a window-shutter.

IF

Watching at a distance.

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all. 3 *Inst.* 64.

Churches, &c.

The mansion-house] This includes also churches, and the walls or gates of a walled town. 1 *Haw.* 103.

Out-buildings.

Mr. *Hawkins* says, all out-buildings, as barns, stables, dairy houses, adjoining to a house, are looked upon as part thereof; and consequently burglary may be committed in them: but if they be removed at any distance from the house, it seems that it hath not been usual of late to proceed against offences therein as burglaries. 1 *Haw.* 104.

Parcel of the messuage.

And lord *Hale* says more explicitly, the mansion-house doth not only include the dwelling house, but also the out-houses that are parcel thereof, as barn, stable, cow house, dairy house, if they are parcel of the messuage, tho' they are not under the same roof, or joining contiguous to it; and so, he says, it was agreed by all the judges: but if they be no parcel of the messuage, as if a man take a lease of a dwelling house from one, and of a barn from another; or if it be far remote from the dwelling house, and not so near to it as to be reasonably esteemed parcel thereof, as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house, then the breaking it is not burglary, for it is not a mansion-house, nor any part thereof. 1 *H. H.* 558, 9.

Work-shop.

To break and enter a *shop*, not parcel of the mansion-house, in which the shopkeeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house, in which a burglary may be committed. 1 *H. H.* 557, 8.

No person in the house.

It is not necessary to make it burglary, that any person be actually in the house, at the very time of the offence committed. 1 *Haw.* 103.

Country-house.

At *Newgate* sessions in *January*, 1750, *John Nutbrown* and *Miles Nutbrown* were indicted for burglary in the dwelling house of one Mr. *Fakney* at *Hackney*, and stealing divers goods. It appeared by Mr. *Fakney's* evidence that he held this house for a term of years not yet expired, and made use of it as a country house in the summer, his chief residence being in *London*: That about the latter end of the last summer, he removed with his whole family to his house in the city, and brought away a considerable part of his goods: That in *November* last, his house was broke open and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed, or kitchen furniture, or any thing else for the accommodation of a family. Mr. *Fakney* being asked, whether at the time he so disfurnished his house, he had any intention of returning to reside there, declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let for the remainder of his term. The fact the prisoners were charged with was sufficiently proved; and was committed about midnight the first of *January* last. The court was of opinion, that the prosecutor having left his house, and disfurnished it in the manner before-mentioned, without any settled resolution of returning but rather inclining to the contrary, it could not, under these circumstances, be deemed his dwelling house, at the time the fact was committed; and accordingly

When a dwelling house.

cordingly directed the jury to acquit the prisoners of the burglary, which they did, but found them guilty of felony in stealing the clock and some other small matters. And they were ordered for transportation.——And the distinction is this: Where the owner quittance the house, *animo revertendi*, it may still be considered as his mansion-house, tho' no person be left in it; many citizens and some lawyers do so from a principle of good husbandry, in the summer, or for a long vacation. But there must be an intention of returning, otherwise it will be no burglary. *Fost. 76, 77.*

In the night] As long as the day continues, whereby a man's countenance may be discerned, it is called day; and when darkness comes, and day light is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. *3 Inst. 63.*

And this doth aggravate the offence; since the night is the time wherein man is at rest, and wherein beasts run about seeking their prey. Hence in ancient records, the twilight was signified, when it was said, *inter canem & lupum* (between the dog and the wolf) for when the night begins, the dog sleeps, and the wolf seeketh his prey. *3 Inst. 63.*

With intent to commit felony] There can be no burglary, but where the indictment both expressly alledges, and the verdict also finds, an intention to commit some felony; for if it appear that the offender meant only to commit a trespass, as to beat the party, or the like, he is not guilty of burglary. *1 Haw. 105.*

However, it seems the much better opinion, that an intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law; because where ever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. *1 Haw. 105.*

Whether the felonious intent be executed or not] Thus they are burglars, who break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken, though it is not material of what value.

Where a man commits burglary, and at the same time steals goods out of the house, it is also larceny; and if he be acquitted of the burglary, he may notwithstanding be indicted of the larceny; for they are several offences, tho' committed at the same time. And burglary may be, where there is no larceny; and larceny may be, where there is no burglary. *2 H. H. 246.*

3. By the *11 Jac. 1. cap. 3.* and *9 Will. 3. cap. 32.* Benefit of clergy is taken away in cases of burglary, both from the principal and the accessory before; but in all cases of burglary, accessories after must have their clergy. *2 H. H. 364. 1 Haw. 357, 8.*

II. Reward

II. Reward for convicting a burglar.

Killing a burglar.

1. It may be observed in the first place, that it is provided by the 15 *Car. 1. cap. 9.* that there shall be no forfeiture of lands or goods, for killing any person that attempts to commit burglary.

Rewards.

But besides this indulgence to a person killing such an offender in defence of his house, there are special advantages and rewards for apprehending and convicting him in due course of law, which are as follows:

Convicting a burglar.

2. By the 8 *Ann. cap. 8.* Every person who shall apprehend and take any persons guilty of burglary, or the felonious breaking and entring of any house in the day time, and prosecute them until they be convicted of such felony, shall receive five pounds within twenty-one days after such conviction, to be paid by the collector of the district where such felony or burglary shall be committed, without any fee for the same, they tendering a certificate to the said collector, under the hands of the judges before whom such felon shall be convicted, certifying the conviction of such felon for the said offences, and in what parish the same were committed; and also that such felons were taken by the persons claiming the said reward. *sect. 1.*

Several claimants.

3. And in case any dispute shall arise between the persons apprehending any of the said felons, touching the right to the said reward, the judges shall by their said certificate appoint the said reward to be paid amongst the parties claiming the same, in such proportions as to the said judges shall seem reasonable.

Persons killed in pursuit, &c.

4. And in case any watchman or other person shall happen to be killed by any such burglar or house-breaker, such watchman, &c. endeavouring to apprehend or in making pursuit after them, the executors or administrators of persons so killed, to whom the right of administration of the personal estate of such persons, shall belong, upon certificate delivered under the hands and seals of the judges of assize of the county where the fact was committed, or the two next justices of the peace, of such persons being so killed, which certificate the said judges or justices respectively, upon sufficient proof before them made, are required to give without fee, shall receive twenty pounds from the collector of the district where the said fact was committed, and upon failure of payment thereof by the said collector, the sum of forty pounds, to be recovered against him with treble costs of suit, in manner aforesaid. *sect. 2.*

Twenty pounds.

Discovering burglars.

5. And moreover, if any person being out of prison, discover two or more persons who shall commit any such burglary or felony, so as two or more of the persons discovered shall be convicted, such discoverer shall have the like reward of five pounds, hereby promised to be paid to the persons who shall apprehend and convict house-breakers, and all other advantages given to such taker and prosecutor, and shall be also intitled to pardon for all burglaries, robberies, and felonies, except murder and treason, committed before such discovery made, which pardon shall likewise be a good barr to any appeal brought for such burglary or felony. *sect. 4.*

Reward and pardon.

Warrant to apprehend a burglar.

County of Dublin } To the constable of——

FORASMUCH as A. I. of——in the county of——yeoman, hath this day made information and complaint upon oath, before me J. P. esquire, one of his majesty's justices of the peace for the said county, that yesterday in the night, the dwelling house of him the said A. I. at——aforesaid in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of 5l. of the goods and chattels of him the said A. I. feloniously and burglariously stolen, taken, and carried away from thence; and that he hath just cause to suspect, and doth suspect, that A. O. late of——in the county of——labourer, the said felony and burglary did commit: These are therefore, in his said majesty's name to command you, that immediately upon sight hereof you do apprehend the said A. O. and bring him before me to answer the premisses, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal the——day of——in the year——.

Indictment for proper burglary.

County of **T**HE jurors for our lord the king upon their oath present, Dublin. That A. O. late of——in the county of——labourer, on the——day of——in the——year of the reign of——at the hour of one in the night of the same day, with force and arms, at——in the county of——the dwelling house of A. I. feloniously and burglariously did break and enter, with intent him the said A. I. of his goods in the same dwelling house then being, feloniously and burglariously to spoil and rob, and the same goods feloniously and burglariously to steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Indictment for burglary and larceny.

County of **T**HE jurors for our lord the king upon their oath present, Dublin. That A. O. late of——in the county of——labourer, on the——day of——in the——year of the reign of——betwixt the hours of ten and eleven in the night of the same day, with force and arms, at——in the county of——the dwelling house of A. I. feloniously and burglariously did break and enter, and one silver tankard of the value of 5l. of the goods and chattels of him the said A. I. in the same dwelling house then and there feloniously and burglariously did steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Houseburning
at the common
law.

1. **M**aliciously and voluntarily burning the house of another, by night or by day, is felony at the common law. 1 Haw. 105.

Maliciously and voluntarily] For if it be done by mischance, or negligence, it is no felony. 3 Inst. 67.

Malicious in-
tention.

Yet if a man maliciously intending only to burn one persons's house, happens thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other; for where a felonious design against one man misseeth its aim, and takes effect upon another, it shall have the like construction as if it had been levelled against him who suffers by it. 1 Haw. 106.

Some part must
be burned.

Burning] Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to a part of a house, will amount to felony, if no part of it be burned; but if any part of the house be burnt, the offender is guilty of felony, notwithstanding the fire afterwards be put out, or go out of it self. 1 Haw. 106.

Any house or
out-buildings.

The house] Not only a mansion house, and the principal parts thereof, but also any other house, and the out-buildings, as barns and stables adjoining thereto; and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is felony at common law. 1 Haw. 105.

Burning ones
own house.

Of another] Mr. Hawkins says, a person seised in fee, or but possessed for years, of a house standing by itself at a distance from all others, cannot commit felony in burning the same: Also, that it seems the much stronger opinion, that a man so seised or possessed of a house in a town, who burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony; but however it is certainly an offence highly punishable, in regard of the malice thereof, and the great danger to the publick which attends it; and the offender may be severely fined, and imprisoned during the king's pleasure, and set on the pillory, and bound to his good behaviour. 1 Haw. 106.

House of ano-
ther.

And so it was in *Holmes's* case, M. 10. Cba. *Holmes* was indicted at *Newgate* sessions, and convicted, for that he, being possessed of a house in *London* for six years, remainder to another for three years, reversion to the corporation of *Haberdashers* in fee, did burn the said house. And the indictment being removed into the king's bench by certiorari, it was held by three justices, against the opinion of *Croke* justice, that it was not felony to burn a house whereof he was in possession by virtue of a lease for years. For they said, the burning of a house is not felony, unless it be the house of *another*. Wherefore he was discharged of the felony. But because it was an exorbitant offence, they ordered, that he should be fined 500 l. to the king, and imprisoned during the king's pleasure; and should stand upon the pillory, with a paper upon his head signifying the offence, at *Westminster*, and at *Cheapside*, upon the market day, and in the place where he committed the offence; and should be bound to his good behaviour during life. Cro. Car. 376.

In the case of *Elizabeth Harris*, at *Aylesbury*, Lent assizes 1753, before Mr. justice *Denison*; *Elizabeth Harris*, a girl of 14 years of age, and of sufficient understanding for her years, was indicted for maliciously setting fire to and burning a dwelling house, in the possession of *Edward Stokes*: and *Anne*, the wife of *William Course*, was indicted as an accessory to the felony before the fact. The prisoner *Elizabeth Harris* was the daughter of the prisoner *Anne* by a former husband, *John Harris*.

It appeared in evidence at the trial, that *John Harris* died seised of the equity of redemption of this house and of another adjoining to it, subject to a mortgage term for 20 l. And that the equity descended to his eldest son, a child left with other children under the care of their mother the prisoner *Anne*; who was intitled to dower out of these houses, but no dower was ever assigned: That *Anne*, having the care of her son and his estate, let these houses to *Edward Stokes* at the rent of 5 l. a year, and received the rent for some time; but having a large family of children, she was obliged to ask relief of the parish where she lived: That she was denied such relief, on account of these houses; the parishioners insisting, that the overseers of the poor should be let in to the receipt of the rent, before she should be intitled to any parochial relief: That thereupon she frequently declared, she would set the housing on fire, if the parish did not relieve her; that she had young children, whom the parish could not punish, tho' they might punish her; and she would order the least child she had who could carry a coal of fire, to burn the housing down: And many other declarations of the like kind she made, which discovered an obstinate resolution in her to burn the houses, rather than submit to the terms the parishioners insisted on. It appeared further, that the prisoner *Elizabeth* set the house on fire by the direction of her mother the prisoner *Anne*, who went from home on purpose to be absent at the time the fact was committed; and that no other house was burnt.

The jury found both the prisoners guilty. But a doubt arising by reason of the interest the prisoner *Anne* had in the house, Mr. justice *Denison* thought proper to respite judgment, in order to take the opinion of the judges on the case.

July the 2d, 1753, at a meeting of the judges, it was unanimously agreed, that both the prisoners are guilty of felony. The only doubt was, with regard to the interest the prisoner *Anne* had in the house; and it was grounded on the reasoning in *Holmes's* case: for had she had such estate in the house as would have cleared her of the charge of felony; the prisoner *Elizabeth*, who acted by her directions, could not have been guilty of felony.

But all the judges agreed, that the prisoner *Anne's* title or dower was not such an interest as could bring her within the rule in *Holmes's* case. *Holmes* had the possession by legal title, and during the continuance of his lease could maintain his possession against all mankind; and therefore the house might in a limited sense be called *his own*. But in the present case, the possession was in *Edward Stokes*, under a demise from *Anne* in behalf of her son, and subject to a yearly rent which she received. And her title to dower, had *Edward Stokes's* interest been out of the case, did not so much as give her a right of entry, it being a bare right of action. Mr. justice *Denison* said, that he had no doubt upon him from the beginning. But it

Burning.

being a new case, and some of the bar being doubtful, he thought it advisable to take the opinion of the judges.

At the next assizes, judgment of death was pronounced upon both the prisoners; and *Anne* the mother was executed. But *Elizabeth* being young, and acting under her mother's direction, was reprieved, and recommended to mercy on condition of transportation.

It was said in the debate of this case by some of the judges, and not denied by any, that had *Anne* been seized of the freehold and inheritance of the house, and *Stokes* in possession under a lease, it would have been felony in *Anne* to have burnt it: otherwise all tenants and their concerns would be very much at the mercy of their landlords. And the principle the three judges went upon in *Holmes's* case, doth seem to warrant this opinion. They considered the house then under consideration as the property of *Holmes*, as *his own house*, by reason of the estate he had in it under his lease. *Groke* (who differed from them) did not dispute the principle, but argued against the conclusion the other judges drew from it. And if this be so, Mr. justice *Foster* says, he does not see why it may not with strict legal propriety be said of a reversioner, who should maliciously set fire to houses in the possession of his tenants under leases from himself or his ancestors, that he burned the *houses of another*. The judgment in *Holmes's* case, to say no more of it, was a very merciful judgment. The house might with strict legal propriety have been considered as the house of the landlord. Both landlord and tenant have a property, one temporary and limited, the other absolute and perpetual; like the person to whom goods are delivered, and the absolute owner thereof, in the case of larceny.

Note, it was stated in this case, that the daughter, who committed the fact at the instigation of the mother, was *of the age of 14, and of sufficient discretion*. But if the mother had employed, as she threatened she would, the least of her children; then *she* must have been indicted as the principal, since the child not being of years of discretion was innocent. *Fost.* 113, 349.

Burning. &c.
high treason.

2. By the 13 *Hen. 8. c. 1.* All wilful burning of ricks of corn in the fields and in towns, and burning of houses of any of the king's subjects, *shall* be high treason and like process judgment and execution *shall* be awarded as against any that do commit treason in any other manner, saving to the chief lords of the soils their escheats.

Setting on fire
felony.

3. And by the 29 *Geo. 2. c. 12.* If any person shall wilfully or maliciously set fire to any house, out-houses, barn, or stable; or to any hay-yard, stack, or rick of corn, straw, hay, or turf; or to any ship or boat, although the same be not burned; or shall be procuring, aiding, or assisting in any of the said offences; every person so offending, being lawfully convicted, shall be adjudged guilty of felony without benefit of clergy. *Stat. 3.*

Provided that nothing herein contained shall extend to any persons who shall burn the turf which shall be cut on his landlord's turbary, without leave first obtained for cutting the same. *f. 4.*

Reward for
discovering.

Any person who shall discover and prosecute to conviction any such felony, shall be intitled to a reward of ten pounds, to be recovered as aforesaid, against the inhabitants of the barony in which such felony shall be com-

committed; and if such discoverer and prosecutor be a party concerned in such felony, he shall not only be intitled to the said reward of ten pounds, but be intitled to his pardon for any felony before that time, by him or her committed against this act. *§. 8.*

The inhabitants of every barony, as well protestants as papists, shall make full satisfaction to every person, their executors and administrators, for the damage which they shall have sustained by setting fire to any house, out-houses, barn, stable, hay-yard, stack, or rick of corn, hay, straw, or turf, or to any ship, or boat, which shall be committed in that barony; and every person who shall sustain damages by any of the felonies aforesaid, is hereby enabled to sue for, and recover such their damages, the sum to be recovered, not exceeding fifty pounds, against any one or more of the inhabitants of the said barony, who shall be made liable to answer all or any part thereof. *§. 5.*

Barony to make satisfaction.

And if such persons shall recover and obtain execution against any such inhabitants, all other the inhabitants of the barony, who by this act shall be liable to the said damages, shall be rateably taxed, towards an equal contribution for the relief of such inhabitants, against whom such execution shall be levied; which tax shall be made and raised in manner as has been heretofore used for the levying and raising money. *Rateably taxed.*

Provided, that no person shall be enabled to recover any damages by virtue of this act, unless they, by themselves, or by their servants, within two days after such damages done them, shall give notice of such felony committed unto some of the inhabitants of some town, village, or hamlet in the barony near unto the place where any such fact shall be committed; and shall within four days after such notice to the high constable of the said barony, of the said offence, and shall also give in their examination upon oath, or the examination upon oath of their servant or servants that had the care of their house, out-houses, corn, hay, straw, turf, ship, or boat, before some justice of the peace of the county where such fact shall be committed, inhabiting within the barony where the said fact shall happen to be committed, or near unto the same, whether they do know the persons who committed the said fact, or any of them; and in such case, such examiners shall be bound by recognizance to prosecute such offenders. *§. 6.*

Notice in two days.

Examinations on oath.

Provided also, that when any felony shall be committed against this act, and any one of the offenders shall be apprehended and convicted of such felony at the next assizes, to be held for the county where such felony was committed, no barony nor any inhabitant thereof, shall be subject to make any satisfaction for the damages sustained. *§. 7.*

Conviction of one offender.

This act is made perpetual, by stat. 1. G. 3. c. 17. sect. 18.

4. By the act of 1 G. 2. c. 24. If any persons shall wilfully and maliciously burn or set on fire any stack of coals or charcoal or vein or mine of coals under ground, or any shafts or passages leading thereto, such offenders being thereof convicted, shall be adjudged felons without the benefit of clergy or of the statute, *§. 3.*

Burning coals or mines.

5. By the act of 11 Geo. 2. c. 9. If any owner of, or captain, master, or mariner or other officer belonging to any ship, shall wilfully burn, or otherwise destroy the ship of which he is owner or to which he belongeth, or in

Burning ships.

Burning.

in any manner directed or procure the same to be done, to the prejudice of any persons, bodies politic or corporate, that shall under-write or execute any policy of insurance thereon, or of any merchants that shall load goods thereon and shall be convicted thereof, such persons so offending shall be adjudged guilty of felony without the benefit of clergy or of the statute *Sect. 2.*

Servants burning houses by negligence.

6. By the act 2 G. 1. c. 5. If any servant through negligence shall fire or occasion the burning of any dwelling-house or out-house, such servants being thereof convicted by the oath of one credible witness made before two justices of the peace, shall forfeit fifty pounds unto the church-wardens of such parish where such fire shall happen, to be distributed by the grand-jury at the next quarter-sessions where such fire shall happen, amongst the sufferers by such fire in such proportion as to the grand-jury shall seem just, and in case of refusal to pay the same immediately after such conviction, the same being lawfully demanded by the said church-wardens, such servants shall by warrant under the hand of two justices of the peace be committed to some work-house or the house of correction, as the said justices shall think fit for eighteen months there to be kept to hard labour. *Sect. 4.*

Burning corn in the straw.

7. By the act. 10 & 11 Car. 1. c. 17. No person shall by himself, wife, children, servants, tenants, or any of them, burn corn or grain in the straw, upon pain of imprisonment in the common gaol of the county wherein the offence shall be committed for ten days without bail or mainprize for the first offence, and the delinquent to pay the charge of sending them to the gaol before they be thence enlarged, and for the second offence to be imprisoned one whole month without bail or mainprize, and to pay the charges as aforesaid, and for the third offence to forfeit forty shillings, and to be bound unto the good behaviour and to pay the charges as aforesaid, the said forty shillings to be paid towards the relief of the prisoners in the said gaol, and to be paid unto the chief magistrate of the place where such gaol shall be, before the offender be discharged, and at his discretion to be distributed. *f. 1.*

Trial of offenders.

And it shall be lawful for the justices of peace of the county where such offences shall be committed in their sessions of the peace, to inquire and determine of all offences against this act, and at all times out of the sessions, as well by oath as all other lawful means to try and find out the said offences, and to commit the offenders according to this act.

Burning mountain, &c.

8. By the 10 Will. 3. c. 8. No person shall burn on any mountain, bog, heath or waste ground, any grig, ling, furs, heath, gos, or fern, at any other season of the year save only between the fourteenth day of June and the second day of February in every year, on pain that every person offending shall for every such offence forfeit five pounds; such offence to be heard and determined by any justice of the peace of the county where the same shall be committed, and the forfeiture for the same levied on the goods of the offender by warrant under the hand and seal of such justices, and paid one moiety to the poor of the parish where the offence shall be committed and the other to the informer, &c.

Threatening to burn a house.

9. By the commission of the peace, any justice may cause to come before him, all those who to any of the people concerning the firing of their houses

Burning Land.

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houses have used threats, to find sufficient security for the peace for their good behaviour towards the king and his people, and if they shall refuse to find such security, may cause them to be safely kept in the king's prisons, until they shall find such security.

10. Such as be taken for houseburning feloniously done, are not bailable by justices of the peace. 3 Ed. 1. c. 15. 2 Inst. 189. Houseburning not bailable.

Burning Land.

1. **BY** the act 17 Geo. 2. c. 10. No persons who are or shall be in the possession of land by virtue of any lease, contract, or demise, nor any persons deriving under them, shall burn the soil or surface of the earth in or upon any part of such lands, and if any occupier of land demised or agreed to be demised to any persons shall burn the soil or surface of the earth, or cause or permit the same to be burnt in any part of such land in their possession, or in the occupation of any person deriving under them, every person so offending shall forfeit forty shillings for every *English* statute-acre so burnt, to be recovered by the persons and in manner hereafter mentioned, that is to say, *f. 1.* Lessees and occupiers of land.

If the soil or surface of any land shall be burnt or permitted to be burnt, by the first lessees of such land, their heirs, executors, administrators, or assigns, then the said penalty shall be recovered of such offenders by their lessors, their heirs, successors, and assigns respectively, or by the persons who for the time being shall be intitled to the rent or reversion or remainder of the premises. Burning or permitting to be burnt.

And if the soil or surface of any land shall be burnt or permitted to be burnt, by the occupier of such land holding the same by lease or contract, from the first lessees of such lands, their heirs, executors, administrators, or assigns, or from any persons deriving under them or either of them, the said penalty shall be recovered from such offenders by their immediate lessors, their heirs, executors, administrators, or assigns. Penalty to be recovered,

Unless such immediate lessors shall have consented to such burning, in which case the said penalty shall be recovered by the next immediate lessors who shall not have consented to such burning, it being the intent of this act, that neither the original lessors, nor any intermediate lessors, their heirs, successors, executors, administrators, or assigns, consenting to such burning, shall be intitled to or recover the said penalty. Unless with consent.

2. In order to ascertain the quantity of ground burnt contrary to the intent of this act, and to enable the persons intitled by this act or by covenant in any lease the easier to recover the penalties herein mentioned, it shall be lawful for the persons intitled to the penalty in this act or by covenant in any lease, or any other persons employed by them, to enter upon such land so burnt and to survey the same. *f. 2.* Surveying the land.

3. And if any person shall hinder the persons intitled as aforesaid, or those employed by them from taking such survey, they shall forfeit to the persons intitled to the penalties in this act or by covenant as aforesaid twenty pounds, Hindering survey.
to

Burning Land.

to be recovered by civil bill in the same manner and with the like appeal as the other penalties herein contained.

17 G. 2. made perpetual.

4. And by the act 1 Geo. 3. c. 17. Such part of the act, made in the seventeenth year of the reign of his late Majesty king George the second (cap. 10.) as relates to the burning of land, with the following amendments thereto, shall be perpetual. *s.* 2.

Lessee may recover.

5. In all cases, whether the soil or surface shall be burned, or permitted to be burned by the original lessees, or by the occupiers of land, and where the original lessor is not consenting to such burning, the original lessor shall be intitled to recover the penalty given by the said act from his immediate lessees, who shall be answerable for the acts of their under-tenants, and of the occupiers of such land. *s.* 3.

Ridges or paths to be measured.

6. All ridges or paths, left unburned or intermixed with the parts burned, shall be surveyed in one common survey, with the other parts that shall be burned, and they shall be deemed as part of the land burned, so far as to subject the persons offending, to the penalty in the said act mentioned, equally as if no such ridges or paths had been left unburned. *s.* 7.

Land under an acre.

7. And whereas a doubt hath arisen, whether the penalty for burning the soil or surface as aforesaid, was recoverable under the said act, where the quantity of the soil or surface burned was not a full *English* statute acre: the penalty on the persons so offending, shall be proportioned to the quantity burnt though it be under one *English* statute acre.

Recital of 17 G. 2. c. 10.

8. And also, by the act, 3 Geo. 3. c. 29. *Whereas by an act passed in the seventeenth year of the reign of his late majesty king George the second, to prevent the pernicious practice of burning land, as to such part thereof as relates to the burning of land, was, by an act passed the last session of parliament, with several amendments made perpetual; and whereas by the said last recited act, the original lessors where the soil or surface has been burned or permitted to be burned by the occupiers of the land, and not by the original lessees, have found great difficulties in suing for and recovering the penalty given by the said act: and whereas the remedy provided by the said act has been found not only difficult to the lessors, but also disadvantageous and very expensive to the lessees, or occupiers so burning; for remedy whereof, in all cases whether the soil or surface of any land shall be burned or permitted to be burned by the original lessees, or by the occupiers of such land, and where the original lessor of such land shall not have consented to such burning, in manner as in the said act is mentioned, in such case it shall be lawful for two or more of his majesty's justices of the peace, within their respective jurisdiction, to hear and determine in a summary way, all offences committed against the true intent of the said acts, and for that purpose upon information upon oath given before them by the original lessor, his or her heirs or assigns, or one or more credible witnesses, on their behalf, of the offence of such pernicious burning of land, to summon before any two of them, within their jurisdictions, any parties so accused of being offenders, against the said acts. *s.* 1.*

Burning land,

Two justices may determine offences.

Not appearing on summons,

9. In case the parties accused shall not appear on such summons, or offer some reasonable excuse for their default, then upon the information upon oath as aforesaid, it shall be lawful for the said two justices, to issue their warrants under their hands and seals, for the apprehending the parties so accused

accused, within their respective jurisdictions, and upon their appearing, or in case they shall not appear, and cannot be apprehended on a warrant granted against them as before is directed, then upon notice in writing being given to or left for them at their usual place of abode, and such notice being proved upon oath, in any such case, any two such justices of the peace within their respective jurisdictions, shall proceed to make inquiry touching the matters complained of, and to examine any witnesses, who shall be offered on either side, on oath, and after hearing of the parties who shall appear, and the witnesses who shall be offered on either side, such justices shall convict or acquit the parties accused of the penalties in the said recited acts, together with the cost of surveying the land so burned. *§. 2.*

Notice to be proved.

10. If the penalties inflicted by the aforesaid acts, and to be recovered in the summary way herein directed, shall not be paid within twenty four hours after any such conviction, the said justices so convicting the said parties, shall thereupon issue warrants under their hands and seals, directed to any peace officer within their respective jurisdictions, empowering them to make distress of the goods or chattles of the offenders. *§. 3.*

Distress for non-payment,

11. If any offender shall convey away his goods, out of the jurisdictions of such justices before whom he was convicted, or so much thereof that the penalty cannot be levied, then any chief magistrate or justice of the peace, within whose jurisdiction the offender shall have removed his goods, shall back the warrant granted by the said justices, before whom the conviction was so had, and thereupon the penalties forfeited, together with the cost of surveying as aforesaid, shall be levied on the said offenders goods by distress and sale thereof. *§. 4.*

Conveying away goods,

And if within five days from the distress being taken under the said warrant the money forfeited shall not be paid, the goods seized shall be appraised and sold, rendering the overplus, if any, deducting the penalty and the charges of the distress and sale, to the owner, which charges shall be ascertained by the said justices, before whom any such offender shall have been so convicted, or by the said chief magistrate or other justice who backed the warrant.

Appraisement and sale.

12. For want of such distress, it shall be lawful for the said justices before whom the said conviction shall be had, and for the other chief magistrate or justice within whose jurisdiction any such offender shall reside or be, on the application of any prosecutor, and proof made of the conviction and non-payment of the said penalty, cost, and charges, by warrant under their hands and seals, to commit every such offender to the common gaol within the city, county, or place where the said offender shall be found, there to remain for three months, unless from the time of such commitment payment shall be made of the said penalty before the expiration thereof, *§. 5.*

Committal for want of distress.

13. The said justices before whom any such person shall be convicted in manner prescribed by this act, shall cause such conviction to be drawn in the form, and to the effect following: *§. 6*

Form of conviction.

Burning.

Be it remembred that on this *day of* *in the*
year of the reign *A. B. is convicted before* *his Ma-*
jesty's justice of the peace, for the said county of *or for* *(as*
the case shall happen) for the pernicious burning of land, to wit, the quan-
tity of *and we do therefore adjudge him (or them) to pay and for-*
feit for the same, the sum of *together with the costs of* *for sur-*
veying the same. Given under our hands and seals the *day and year*
aforesaid.

Appeal to the
sessions.

14. If any persons convicted of any such offence punishable as aforesaid, shall think themselves aggrieved by the judgment of such justices before whom they shall have been convicted, such persons shall have liberty to appeal to the justices at the general or quarter-sessions of the peace, unless the said conviction shall be within ten days of the said sessions, and then at the next sessions, or the next following to that, at the option of the party convicted, which shall be held for the said county, city, or place, where such judgments shall have been given. *f. 7.*

Execution to
be suspended.

And the execution of the judgment shall in such case be suspended, the persons so convicted entering into a recognizance at the time of such conviction, with two sufficient sureties in double the sum which such persons shall have been adjudged to pay upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices, at their said general or quarter-sessions, which recognizance the said justices, before whom such conviction shall be had, are required to take.

Costs to be a-
warded.

15. And the justices, at the said general or quarter-sessions, are required to hear and determine the matter of every such appeal, and to award such costs, as to them shall appear just and reasonable, to be paid by either party. *f. 8.*

In case the
judgment be
affirmed.

And if upon hearing the said appeal, the judgment of the justice, before whom the appellants shall have been convicted, shall be affirmed, such appellants shall immediately pay down the sum they shall have been adjudged to forfeit, together with such costs as the justices at their said sessions award to be paid to the prosecutor for defraying the expences sustained by reason of such appeal, and in default of appellants paying the same, any two such justices, or any one magistrate or justice of the peace, having jurisdiction in the place into which any such appellant shall escape, or where they shall reside, shall by warrant under their hand and seal, commit every such appellant to the common goal of the county or place where they shall be apprehended, until they shall make payment of such penalty, and of the costs which shall be so adjudged to the prosecutor.

Committal for
non-payment.

Appeal made
good.

16. But if the appellants, shall make good their appeal, and be discharged of the said conviction, reasonable costs shall be awarded, to the appellants against such prosecutors who would, in case of such conviction, have been intitled to the penalty to have been recovered as aforesaid, which cost shall be recovered by the appellants against such prosecutors, in like manner as is herein before directed to be recovered against such appellant. *f. 9.*

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17. In case the said original lessor, his or her heirs, shall neglect to proceed for the said penalty as aforesaid, within six kalendar months after any such pernicious burning, it shall be lawful for the original lessee, his or her heirs, executors, administrators, or assigns, within six months next after the expiration of the time hereby given to the original lessor, to proceed in the same manner, and recover any such penalty and cost, as is herein before directed in the case of the original lessor. *f. 10.*

Lessor neglecting to sue.

And in case the original lessee shall neglect to proceed for the said penalty and cost as aforesaid, in such cases, it shall be lawful for the next immediate lessors, and so successively, to proceed for and recover the said penalty and cost from the occupiers of the land so burned by them, within three months next after the time hereby granted to the original lessee. *f. 11.*

Lessee neglecting to sue.

Butchers.

1. **B**Y the act 2 *Ann. cap. 15.* No person being a butcher shall at the same time follow or exercise the trade or occupation of a grazier, or shall keep any land in his possession, or in the possession of any other to his use, or in trust for him, for the grazing, fattening, or keeping of any oxen, steers, ronts, cows, heifers, calves, sheep, or lambs, above the quantity of twenty acres, on pain that as well the butcher, and such person so possessed as aforesaid, shall severally forfeit, for every month that they shall offend therein, twenty pounds, the one moiety of which forfeiture to be to the Queen, the other moiety to them that will sue for the same in any court of record in *Dublin*, by action of debt, bill, plaint, or information, in which no essoin, protection, or wager of law shall be allowed, or more than one imparlance. *sect. 1.*

Butchers shall not be graziers.

2. No butcher shall keep at hay, or shall feed any oxen, steers, cows, or heifers, above the space of ten days, on pain of forfeiting all such oxen, steers, cows, or heifers. *sect. 3.*

Feeding cattle at hay.

3. No butcher shall sell or expose to sale, either by himself or any servant or agent, any oxen, cows, steers, heifers, calves, sheep, or lambs alive, to any person within twenty miles of the place where they shall buy the said fat oxen, steers, cows, heifers, calves, sheep, or lambs, on pain of forfeiting the full value of all such oxen, &c. sold or exposed to sale, contrary to this statute, the one moiety of which forfeiture to be to the Queen, the other moiety to them who will sue for the same. *sect. 4.*

4. No butcher by himself or any other person shall unnecessarily gash or cut any hide of any ox, bull, steer, or cow, whereby the same shall be impaired, upon pain of forfeiture for every hide so gashed or cut, the sum of twenty pence. *sect. 5.*

Gashing hides.

5. It shall be lawful for the justices of the peace of the several counties, at their respective quarter-sessions, to hear and determine all the offences aforesaid; and upon the convictions of such offenders before them, to make extracts of the one moiety of the said forfeitures into the exchequer, as had been used to be done in case of other fines and amercements, forfeited to her Majesty in the sessions of the peace, and to award and issue forth execution for the other moiety, due by this act, to the informer or prosecutor, by *capias*

Justices to hear offences.

Butchers.

or *feri facias*, out of the said court of sessions, in such sort as the Queen's-bench at *Dublin*, have in such cases used to do. *sect. 13.*

Prosecution in
six months.

6. Provided that no person shall be sued for any offence against this act, unless such prosecution shall be begun within six kalendar months next after the offence committed. *sect. 14.*

Vexatiously
prosecuted.

7. If upon any prosecution grounded upon this act, it shall appear to the judges or justices of the peace before whom such information shall be presented, that such information or prosecution was promoted only for vexation, and without any reasonable cause, the said judges or justices of the peace shall award the party so unjustly prosecuted treble costs occasioned by such vexatious prosecution, the same to be recovered by *capias* or *feri facias*. *sect 15.*

This statute is made perpetual by Stat. 9 Ann. cap. 7.

Slaughtering
within the
markets.

8. And by the 17 *Geo. 2. cap. 5.* No butcher or other person who shall kill or slaughter any ox, cow, sheep, swine, calf, lamb, or other cattle for sale, shall slaughter, kill, or dress the same within the markets, or where they keep stalls, and every butcher and other person who shall kill or slaughter any ox, cow, sheep, swine, calf, lamb, or other cattle for sale, shall slaughter and flea the same in the most clean and plain manner, and not on any pretence raise or blow the same, or thrust any skewers so as to be concealed therein, or grease or varnish, or any way lay on the flesh of such cattle any fat, tallow, seweet, butter, grease, or other matter, or use any fraudulent and deceitful art to set off the same; and no butcher or other person shall sell or expose to sale any cattle killed, but what shall be killed and dressed in the most plain manner, and according to the meaning of this act. *sect. 4.*

Blowing meat.

Forfeiture of
the meat.

9. And if any butcher or other person shall offend in any of the premises, and be convicted upon oath of the said offence before one justice of the peace of any county, or any chief magistrate of any city or corporation, by one witness, or upon confession of the offenders before such justice, &c. or on view by such justice, chief magistrate, or senechal, the parties so offending shall forfeit such ox, cow, sheep, swine, calf, lamb, or other cattle, or part thereof killed or dressed contrary to this act, to be disposed of by such justices, &c. amongst the poor of the parishes where the offence shall be committed.

And five shil-
lings.

10. And if such beast, or part thereof so forfeited, be not of the full value of ten shillings, such butcher or other persons, shall over and above the said forfeiture, pay for every such offence five shillings, to be levied by distress and sale of the offenders goods, the overplus to be restored after all charges of the said distress defrayed, the said penalty of five shillings to be paid to the persons who shall discover and prove the said offence, and every constable of the parish or chief constable of the barony where such offence shall be committed, are required to levy the same accordingly, by warrant under the hand and seal of such justice, &c.

Want of dis-
tress.

11. And in case such offenders shall not have goods sufficient for the levying of the said penalty, it shall be lawful for the justices before whom such conviction shall be, by warrant under their hand and seal, to appoint such offenders to be publickly whipt through such corporation or next market town, on the next market day immediately following, or imprisoned for any time not exceeding fourteen days.

- I. Of the appointing weigh-masters for butter and Tallow.*
- II. Concerning butter and tallow casks.*
- III. Concerning the packing and weighing of butter and tallow.*
- IV. Exporting of butter and tallow.*

I. Of the appointing weigh-masters for butter and tallow.

1. **B**Y the act 10 Geo. 1. cap. 9. sect. 2. In every city and town corporate, except the cities of *Dublin* and *Cork*, the chief magistrate and aldermen, or chief magistrate and burgeses where there are no aldermen, under the seals of their respective corporations, and in every place of export from whence butter and tallow are commonly shipt for exportation, such place being no city or town corporate, and in every barony wherein there is any market town, the justices of the peace at the general quarter-sessions for the respective counties, in which such places of exportation and baronies lie, under their hands and seals, from time to time, as any vacancy shall happen, shall appoint skilful persons to be publick weigh-masters, for such respective city, town corporate, place of export, and barony.

To be appointed at the sessions.

2. The weigh-masters so to be appointed, shall hold their office during their good behaviour, and until such time as they shall in manner herein after-mentioned, before the chief magistrate and aldermen, or chief magistrate and burgeses of the city or town corporate, or before the justices of peace at the general quarter-sessions for the county, in which such place of export or barony lies, for which they are appointed weigh-masters respectively, be convicted of having acted contrary to the duty of their office. sect. 3.

During good behaviour.

3. The chief magistrate and aldermen, or chief magistrate and burgeses in cities and towns corporate, and the justices of the peace at the general quarter-sessions in their respective counties, shall upon full proof of the misbehaviour of such weigh-masters in their office, either upon full hearing of them, or upon their being duly summoned and neglecting to appear, by writing under the hands and seals of the major part of them, remove such weigh-masters and appoint others in their stead. sect. 4.

Removal from their office.

4. Provided that if any weigh-master so removed, or the persons so complaining of them, shall think themselves aggrieved by the determination of such chief magistrate and aldermen, chief magistrate, and burgeses or justices of the peace, it shall be lawful for the party who shall think himself aggrieved, to apply by petition to the justices of assize for the county or place in which the city, town corporate, place of export, or barony, shall lie in their next circuit, who are required to hear and finally determine the matter of such petition, and to restore such weigh-masters if unduly removed, or to remove them if the complaint be just, by warrant under their hands and seals, and to award reasonable costs to the party, who, upon hearing such petition, shall appear to be aggrieved, which costs shall be paid within a time to be appointed by such justices of assize, and in default of payment the party against whom the costs are awarded, shall be committed till the same are paid. sect. 5.

Petition to the judges of assize.

Costs.

5. Every

Butter and Tallow.

5. Every weigh-master to be appointed in pursuance of this act, before he shall enter upon the execution of such office, shall perfect a bond with sufficient security to the chief magistrate of such city or town corporate respectively, or enter into a recognizance before the justices of peace at the quarter-sessions for such county. of such penalty as the said chief magistrate or the justices of peace shall think reasonable, not exceeding five hundred pounds, nor less than twenty pounds, conditioned for his faithful execution of his said office, and shall likewise take before the said chief magistrate or justices the oath following. *sect. 6.*

Oath.

I A. B. do swear, that I will diligently and faithfully execute the office of public weigh-master, during the time I shall continue in the said office, I will take care truly, without fraud or delay, to weigh all butter and tallow, and to weigh and brand all butter and tallow casks in such order, as the said goods shall be brought to me to be weighed or branded; and in all other respects I will truly execute my said charge.

So help me God.

Weigh-houses.

6. Every weigh-master to be appointed in pursuance of this act, shall provide convenient weigh-houses, to be approved in each city and town corporate, by the chief magistrate and aldermen, or chief magistrate and burgeses, and in every other place of export and barony, which weigh-house in each barony shall be in some market town, to be approved by the justices of peace at their respective quarter-sessions; and shall also provide beams, scales, weights, branding-irons, and other necessities at his proper charge, and shall attend at his weigh-house by himself, or by a sufficient deputy, to be approved of by the chief magistrate and aldermen, chief magistrate and burgeses, or justices of the peace at the quarter-sessions respectively, in every city and town corporate, where butter and tallow have been usually sold, and in every other place of export from whence such commodities are commonly exported, every day in the week, *Sundays* and *Holydays* excepted, from six of the clock in the morning till twelve, and from two in the afternoon till six, from the twenty-fifth day of *March*, 'till the twenty-ninth day of *September*, and from thence to the twenty-fifth day of *March*, from eight in the morning till twelve, and from two in the afternoon till four; and in such towns corporate where butter or tallow are not usually sold, and in such places of export from which the said commodities are not commonly exported, on market days only, during the hours aforesaid, and then and there weigh, brand, and mark all such commodities and empty casks, as by this act he is required. *sect. 7.*

Scales, weights,
&c.Hours of at-
tendance.Marking casks
falsely.

7. If any weigh-master or his deputy shall mark any cask falsely, as containing more or less than the true weight, the weigh-master, by whom or by whose deputy any such cask shall be falsely marked, being convicted thereof, as aforesaid, shall, for every such cask falsely marked, forfeit ten shillings. *sect. 9.*

Fees for weigh-
ing and brand-
ing.

8. Every weigh-master who shall, in pursuance of this act, be appointed to weigh and brand empty casks for butter and tallow, shall receive from the person bringing the same to be weighed and branded, one penny for every

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every empty cask weighed and branded of any size whatsoever, and for the weighing and branding of every cask of butter one penny, for every cask of tallow a half-penny *per* hundred net, and upon refusing to pay the above fees for the aforesaid goods by the persons bringing them to be weighed, it shall be lawful for any weigh-master or his deputy, to detain such goods or empty casks, until satisfaction be made according to this act. *sect. 13.*

9. If any weigh-master shall neglect to attend on the days, and during the times hereby appointed by himself or his deputy, such weigh-master shall for each offence of himself or deputy respectively, forfeit five pounds, to be recovered by them who shall sue for the same by civil bill in the respective counties, where such weigh-houses are appointed, and in the county of the city of *Dublin* and county of *Dublin* at the quarter-sessions respectively, provided that such civil bill be brought at the next assises or quarter-sessions respectively. *sect. 14.*

Neglect of attendance.

10. Every person who shall counterfeit or alter the brand or mark of any weigh-master, shall forfeit ten pounds for every such offence, to be recovered by civil bill as aforesaid, by any person who shall sue for the same. *sect. 15.*

Counterfeiting brands.

This act is continued by Stat. 21 Geo. 2. cap. 7. until the 29th of September, 1769, and to the end of the then next session of parliament.

11. By the 12. *Geo. 1. cap. 5.* No weigh-masters or their deputies shall brand the tare on butter or tallow casks with numeral letters, but instead thereof shall make use of figures in branding such casks; and in case any weigh-masters or their deputies shall make use of numeral letters in branding the tare on butter and tallow casks, they shall, for every such offence, forfeit five shillings, to be recovered, levied, and distributed in manner aforesaid. *sect. 8.*

Figures to be used in branding.

12. No weigh-masters, their deputies, or any other person in trust for them, appointed by this or the former act, for weighing butter or tallow in any city or town corporate, or in any place of export, shall buy, sell, contract, or treat for at their respective weigh-houses, any butter or tallow, in such city, &c. where such weigh-masters, his or their deputies, shall be appointed pursuant to this or the former act, until such butter or tallow shall be legally weighed and branded; discharged and carried off from such weigh-house; and in case any weigh-masters or their deputies, or other person in trust for them, shall buy, sell, contract, or treat for any butter or tallow in any city or town corporate, or place of export, where such weigh-masters or their deputies are appointed, before such butter or tallow are legally weighed and branded, discharged and carried off from such weigh-house, they shall, being thereof lawfully convicted before the chief magistrate of the place, or the next justice of the peace, forfeit for every such offence the goods so bought or sold by them, the same to be recovered and distributed in manner aforesaid. *sect. 9.*

Not to buy or sell.

Forfeiture of the goods bought.

13. No cooper or other person who shall be employed in any weigh-house in any city or town corporate or place of export, or any other person or persons in trust for him or them, shall buy, sell, contract, or treat for any butter or tallow at the weigh-house where such person shall be employed; and

Coopers in weigh-houses.

Butter and Tallow.

and in case any such person, or any person in trust for them, shall offend contrary to this act, such person shall forfeit twenty shillings for every cask of butter or tallow, such person shall buy or sell as aforesaid, the same to be recovered, levied, and distributed in manner aforesaid. *sect. 10.*

This act is continued by Stat. 21 Geo. 2. cap. 7. until the 29th of September, 1769, and to the end of the then next session of parliament.

Coopers not to
be weigh-mas-
ters.

14. And by the 13 Geo. 2. cap. 12. *sect. 6.* No cooper during the time such cooper shall follow the trade of a cooper, or shall employ any apprentice, or other person, in making casks for packing up butter or tallow for his use, or in trust for him, shall be capable of being appointed a weigh-master or deputy weigh-master.

II. Concerning butter and tallow casks.

Casks how to
be made.

To be weighed
and branded.

Penalty on
offenders.

Marking false-
ly.

1. By the 10 Geo. 1. cap. 9. No persons shall buy or sell any empty casks for packing of butter for sale or export, unless such cask be made of good seasoned oak, ash, or sycamore, whereof no part to be bogg-timber, and made tight that they will hold pickle with head and bottom equally dooled and set to the cross, with twelve good fresh sufficient hoops on each cask all well twigged with good fresh osier twiggs, nor before such casks shall be weighed and branded by some weigh-master, pursuant to this act appointed, which weigh-masters or their deputy, are required to weigh all such empty casks, and to allow on account of sokage two pounds more on each firkin, that shall contain half a hundred weight of net butter, and four pounds on each cask, containing a hundred weight, and so in proportion to the size of the cask, the weight of which empty cask, with the allowance for sokage as aforesaid, the said weigh-master or his deputy is required to brand on the head, side, and bottom of every such empty cask, together with the first letter of his christian name and his sir-name at length, with the name of the place where such weigh-house shall be kept. *sect. 8.*

2. In case any weigh-masters or their deputy shall weigh or brand any such casks not made as aforesaid, or any persons shall buy or sell any casks not branded as aforesaid, the said weigh-master, buyer, and seller, being thereof convicted, before the chief magistrate of the place, or some justice of the peace of the county or division where such offence shall be committed, upon the oath of one credible witness, shall for every such offence forfeit five shillings, to be levied by warrant under the hand and seal of such chief magistrate or justice of the peace, by distress and sale of the goods of the offenders, one moiety of which forfeiture shall go to the poor of the parish, and the other to the informer.

3. If any weigh-master or his deputy shall mark any cask falsely as containing more or less than the true weight, the weigh-master by whom or by whose deputy any such cask shall be falsely marked being convicted thereof as aforesaid, shall for every such cask falsely marked forfeit ten shillings. *Sect. 9.*

4. All

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4. All casks in which tallow shall be packed or made up, shall before the same be filled or packed, be brought to one of the said publick weigh-houses, where such weigh-master or his deputy shall brand the true weight of such cask on side, bottom, and top, with the first letter of his christian-name and his fir-name at length, and the place of his abode. Tallow casks

And in case any persons make up tallow in any cask and shall expose the same to sale, or attempt to export any tallow, where the casks are not branded as aforesaid, such persons shall forfeit for every such cask of tallow ten shillings *sterling*, to be upon conviction recovered, levied, and distributed in manner as before mentioned. *s.* 10. Penalty.

5. Provided that no weigh-master shall weigh and brand as aforesaid, any empty cask which may contain half a hundred of net butter that shall weigh less than ten pounds, and so in proportion for a larger cask. *s.* 11. Weight of butter casks.

This act is continued as explained and amended by stat. 12. Geo. 1. cap.

5. and stat. 13 Geo. 2. cap. 12. with the several alterations and amendments made by stat. 21 Geo. 2. cap. 7. until the 29th day of September 1769, and to the end of the then next session of Parliament by the last mentioned act.

6. And by the 20 Geo. 1 c. 5. *sect.* 1. Every cask wherein tallow shall be made up or packed shall have thereon twelve sufficient hoops of a size proportionable to such cask and no more, and every person that shall pack tallow in any such cask shall brand the first letter of his christian-name and his fir-name at length, with the place of his abode upon every such cask. Number of hoops.

7. And any person who shall sell or expose to sale, export or attempt to export, or that shall buy any cask of tallow that shall have thereon more or fewer than twelve hoops of proper size for such cask, or that shall not be branded with the persons name and place of abode that packed such tallow as aforesaid, knowing the same, being thereof convicted, before the chief magistrate of the place or a justice of the peace of the county or division where such offence shall be committed, by the oath of one witness or by the confession of the party, shall forfeit five shillings for every such cask so bought, sold, or exposed to sale, exported or attempted to be exported, to be levied by warrant under the hand of such chief magistrate or justice of the peace, by distress and sale of goods of the offenders, one moiety of which forfeiture shall go to the poor of the parish where such offence was committed, and the other to the informer, and whatever shall remain of the price of such goods shall be given to the party whose goods were so distrained, and for want of such distress the offender shall be committed to gaol, there to remain without bail or mainprize for any time not exceeding ten days. Penalty for offences.

8. It shall be lawful for any persons to make, buy, or sell any empty casks for packing butter for sale or export, or to pack butter in any casks of good seasoned beech, birch, willow, or sally, whereof no part is of bog timber, as well as of oak, ash, or sycamore, so as the same be made tight, according to the several regulations laid down in the former act. *sect.* 5. Timber for casks.

Butter and Tallow.

Size of butter-casks.

9. No person shall buy or sell any empty casks for packing butter for sale or export, unless such empty casks be made according to the following contents, viz, no cask shall contain less than half an hundred, and no cask more than three hundred of net butter, and weigh-masters shall brand every such cask containing above two hundred weight of butter with the tare that such cask shall really weigh, allowing at the rate of four pounds weight for every hundred for fokage. *s. 6.*

Coopers to brand casks.

10. Every cooper who shall make any cask or casks for packing butter for sale or export, shall brand on every such cask the first letter of his christian-name and his fir-name at length, with the place of his abode.

Forfeiture by coopers.

And in case any cooper shall make any cask for packing butter for sale or export, other than of good seasoned oak, ash, sycamore, beech, birch, willow, or sally, or shall not brand the same as is before directed, such cooper shall forfeit for every such cask five shillings, to be recovered, levied, and distributed in manner aforesaid.

Weigh-master offending.

And in case any weigh-masters or their deputies shall weigh or brand any cask for packing of butter not made and branded as aforesaid, such weigh-masters or their deputies shall forfeit twenty shillings for every such cask, to be recovered, levied, and distributed in manner aforesaid. *s. 7.*

Figures to be used.

11. No weigh-masters or their deputies shall brand the tare on buuter or tallow casks with numeral letters, but instead thereof shall make use of figures in branding such casks.

Penalty.

And in case any weigh-masters or their deputies shall make use of numeral letters in branding the tare on butter and tallow casks, they shall for every such offence forfeit five shillings, to be recovered, levied, and distributed in manner aforesaid. *s. 8.*

This statute is continued as altered and amended by stat. 13 Geo. 2. cap. 12. and stat. 21 Geo. 2. cap. 7. until the 29th day of September 1769, by the said act 21 Geo. 2. cap. 7.

Content of casks.

12. By the 21 Geo. 2. cap. 7. sect. 15. It shall be lawful for any persons to make, buy, or sell any empty casks or wooden vessels for packing butter, of any dimensions, provided the same do not contain more than two hundred weight of net butter, and the said weigh-masters, &c. or their deputies are directed to weigh and brand all such casks and vessels.

Above two hundred weight.

13. No persons shall make, buy, or sell any empty casks for packing butter, or make up or pack butter in any casks which shall contain above two hundred weight of net butter.

Penalty.

And if any persons shall make, buy, or sell any empty casks for packing butter, or make up or pack butter in any casks above the contents aforesaid, such persons respectively shall forfeit ten shillings for every such cask so made, bought, or sold, or packed with butter contrary to this act, to be recovered and applied as herein before directed.

III. Concerning the packing and weight of butter and tallow.

1. 2 Geo. 1. cap. 16. sect. 1. No persons shall sell or expose to sale any cask of butter, whereon the tare of such cask shall not be fairly burnt with a branding iron on the side and bottom of such cask, at which tare the buyer thereof shall be obliged to take the same. Tare not branded.

But if such buyer shall at the time of the sale or receiving object against the said tare, it shall be lawful for the buyer to strip any such casks as he shall suspect to be above the tare marked, and if after stripping of such casks, any of them shall be found to weigh one pound more than the tare marked on the side and bottom of such cask, on proof thereof made before the next justice of the peace of the county, city, or town where the said butter is exposed to sale, by the oath of one credible witness other than the parties concerned in buying of the said butter, which oath the said justice is hereby impowered to administer and finally to hear and determine accordingly, the seller shall forfeit twelve pence for every pound the said cask shall weigh more than the tare so marked on the side and bottom of the said cask. Stripping the casks.

And in case the tare is not branded as aforesaid on the said cask, the seller shall forfeit the butter contained in such cask, one moiety of which forfeiture shall go to the buyer, and the other moiety to the poor of the parish where the said butter shall be sold or exposed to sale. Forfeiture of the butter.

2. If any buyer shall for his own lucre and gain endeavour to oblige the person who exposed the said butter to sale, to make any greater allowance than the tare marked on the cask as aforesaid, such buyers notwithstanding any contract with the seller, being thereof convicted, before the next justice of the peace of the county, city, or town where such butter shall be exposed to sale, by the oath of one credible witness other than the parties concerned in the sale of such butter, shall forfeit ten pounds, to be levied by distress and sale of the goods of the party offending by the warrant of such justice before whom the party was convicted, over and above the price of the butter, one moiety whereof shall be paid to the informer, and the other moiety to the poor of the parish where such offence shall be committed. Buyer demanding allowance above the tare.

3. No person shall pack up or mix old butter with new, or use bay-salt instead of white in packing it, or greater quantities of salt than melts in working it up, and persons so offending, and every person exposing to sale such butter so packed up contrary to this act, shall forfeit ten shillings for every hundred weight of butter, and so proportionably for every greater or lesser quantity that shall be in every such cask, one moiety to the informer, the other moiety to the poor of the parish, to be recovered in the same manner as the other penalties in this act are recoverable. Mixing old butter with new.

4. Every person melting tallow shall set with a branding iron upon the side and bottom of every tallow cask the exact tare of such cask, and also shall brand upon the side of the said cask, the first letter of the Chandler or Master's christian name and his fir-name at length with an iron brand, with a mark for the city, town, village, and parish wherein he lives, at which tare the buyer shall be obliged to take the same. Tare of tallow-casks.

Buyer object-
ing.

But if such buyer shall at the time of the delivery object against the said tare, it shall be lawful for the buyer to strip such casks as he shall suspect to be above the tare so marked, if after the stripping of such casks any of them shall be found to weigh more than the tare so branded, the seller shall forfeit one shilling for every pound the cask shall weigh more than the tare so branded, to be recovered and distributed as the other penalties herein before mentioned.

Casks not
branded.

And if such chandler or melter of tallow or other persons exposing tallow to sale, shall expose to sale any cask of tallow not having the tare and the christian-name and fir-name of the person melting such tallow as before directed, such persons so offending shall forfeit for every such offence, ten shillings for every hundred weight of tallow and so proportionably, one half to the informer, the other moiety to the poor of the parish, to be recovered in the same manner as the other penalties in this act. *f. 6.*

Charges of
stripping.

5. Where the buyer of butter and tallow will have the cask stripped, if the tare upon stripping be found to answer according to the brand, the buyers shall pay the charges of stripping; but if the tare be more than the brand, then the seller is to pay for such stripping. *f. 7.*

Mixing tallow.

6. If any chandler or person rendring or packing of tallow, shall mix any unmerchantable tallow in any cask of tallow, such persons so offending, shall forfeit for every such offence ten shillings for every hundred weight of tallow that such casks shall contain, and so proportionably for a greater or lesser quantity; one half to the informer, and the other moiety to the poor of the parish, to be recovered before the chief magistrate of any city or town, or any justice of the peace as aforesaid, upon the oath of two credible witnesses at least, skilled in the said commodities. *f. 8.*

Taking allow-
ance above the
tare.

7. By the 4 *Geo. 1. c. 12.* Every person who shall buy or sell casks of butter at any greater or lesser tare, or shall give or take any greater allowance than the tare branded on such casks, notwithstanding any contract between them, being thereof convicted, before the next justice of the peace for the county, city, or town, where such butter shall be exposed to sale, by the oath of one credible witness, shall forfeit ten pounds, to be levied by distress and sale of the offenders goods, by warrant under the hand and seal of such justice. *f. 2.*

Buyers or sell-
ers to make
oath.

8. Justices of the peace may, if they see cause, compel such buyers or sellers of butter, to make oath, whether the said butter was bought *bona fide* at the tare branded on the casks, and whether any and what allowance was given for the same; and in case of refusal the parties so refusing shall forfeit ten pounds, the aforesaid several penalties to be recovered, levied, and disposed of in the same manner as the penalty against the buyer by the afore-recited act is recoverable. *f. 3.*

Trial at a pub-
lick weigh-
house.

9. And by 10 *Geo. 1. c. 9.* All casks of tallow and butter, before the same be sold in or exported from any sea-port, shall be brought to some publick weigh-house, of such sea-port by this act appointed, there to be tried proved and weighed by such weigh-master or his deputy, who are required strictly to inspect the same, and before they mark or brand the same to see that such butter and tallow be merchantable, and made up according to the known laws of this kingdom. *f. 12.*

10. And in case any such goods shall not appear to be merchantable or so made up, such weigh-masters or their deputies are required to carry such butter and tallow, with the person who brought the same to be weighed before some neighbouring justice of the peace or the chief magistrate of the place, who is hereby impowered to inquire into the same, and if such goods shall upon examination and inspection or due proof appear to him to be unmerchantable or made up contrary to law, he shall adjudge the said goods forfeited, one moiety to the poor of the parish, and the other to the informer. Unmerchantable forfeited.

11. And if such justice or chief magistrate shall be doubtful of the quality of such butter or tallow, or if either party require the same, such justice or chief magistrate is required to summon, examine, and hear upon oath two able merchants of the place in relation to the nature and quality thereof. Examination.

12. And when such butter and tallow so brought to be weighed pursuant to this act, shall appear to such weigh-master or his deputy to be merchantable and made up according to law, such weigh-master or his deputy shall weigh the same, and mark on the head and side of each cask the gross weight thereof, and on the side thereof brand the name of such place of export, together with the first letter of the christian-name and the fir-name at length of such weigh-master as an office mark. How to be branded.

13. And also by the act, 12 Geo. 1. c. 5. When ever any tallow or butter are brought before the chief magistrate or justice of the peace by any weigh-masters or their deputies, as appearing to them to be unmerchantable pursuant to the former act, [10 Geo. 1. c. 9.] the said justice or chief magistrate is required to issue a summons in writing to the persons that brought the same to be weighed and tried, or to the person to whom the said goods shall belong, to appear before him and attend such trial, and if such persons shall neglect to appear according to such summons in ten days after such summons or notice, the said justice or chief magistrate is required to proceed as by the said former act is directed. *f. 4.* Summons in writing.

14. And in case the said justice or chief magistrate upon viewing and trying the same, shall have any doubt of the quality of the said goods, it shall be lawful for such justice or chief magistrate to summon two able merchants of the place, and two other persons skilled in such commodities, to examine in relation to the quality of the said goods according to the said former act. Examination.

15. And if such merchants or other persons shall neglect to attend upon such summons according to the said former act without assigning some sufficient or special cause for their not attending or being examined, every person so neglecting or refusing shall forfeit ten shillings, to be recovered and levied in such manner as is herein before mentioned, and distributed among the poor of such parish where such goods were seized. neglecting to attend.

Whenever any cask or casks of butter or tallow are seized or brought for trial before the magistrate or justice of the peace or seneschal, or are condemned by them, or whenever any distress shall be taken pursuant to this or the former acts, no replevin shall lie, but the judgment of the magistrate or justice shall be conclusive. No replevin.

IV. Exporting of butter and Tallow.

Forfeiture of
butter, &c.

1. By the 2 Geo. 1. c. 16. If any person shall carry any casks of butter or tallow to any custom-house, or place appointed for loading or discharging of goods, with an intent to export the same, on which casks the tare thereof is not branded as by this act is required, all such casks and the butter and tallow therein contained, shall be forfeited to any persons who shall seize the same and give information thereof to any justice of the peace or chief magistrate within their respective jurisdictions, which said justice or chief magistrate shall proceed to examine the same.

2. And if it shall appear by the oath of one credible witness that the tare of such casks was not branded on the same pursuant to this act, such justice or chief magistrate shall adjudge such casks and the butter and tallow therein contained to be forfeited, one moiety thereof to the informer, and the other moiety to the use of the poor of the parish where such casks of butter and tallow shall be seized. *s.* 9.

Officer of the
revenue.

3. No land-waiter or officer of the revenue, intrusted with the loading or putting on board any butter or tallow in order to be exported, shall permit any casks of butter or tallow to be shipped or laden on board any ship, boat, or vessel in order to be exported, unless the tare of such casks be branded thereon pursuant to this act, and if any such land-waiter or officer of the revenue shall offend therein, and be thereof lawfully convicted on any indictment in the court of king's bench, or at the assizes to be held for the county, city, or town where such offence was committed, such land-waiter or officer of the revenue shall be incapable of serving his Majesty, &c. in any employment in the revenue during three years after such conviction. *s.* 10.

Weigh-master
may seize.

4. By the 10 Geo. 1. c. 9. If any person shall attempt to export, or lay upon any wharf or key in order for exportation, any butter or tallow casks not branded and marked as aforesaid, such butter and tallow and the casks in which the same are made up shall be forfeited, and may be seized by the weigh-master of the place or his deputy, and upon due proof shall be condemned and sold by the chief magistrate of the place or some neighbouring justice of the peace, and one moiety of the money arising by such sale paid to the person who shall seize the same, and the other moiety to the use of the poor of the parish where such offence shall be committed. *s.* 16.

Forfeiture.

5. And by the 12 Geo. 1. c. 5. No person shall buy or sell for exportation, any tallow or butter made up in casks within any city, town, liberty or division where there are weigh-masters or their deputies appointed pursuant to this or former acts, such tallow or butter not being weighed and branded by such weigh-masters or their deputies, and persons so offending, being thereof convicted in manner before mentioned, shall forfeit the butter or tallow so bought or sold, to be distributed in manner aforesaid. *s.* 2.

6. Also by the act, 13 Geo. 2. c. 12. If any person shall carry or convey any casks of butter or tallow to any custom-house, or to any other place for loading

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loading or discharging of goods, with an intent to export the same, on which casks the weigh-masters brands shall not be marked or branded thereon, as by *stat. 8 Geo. 1. c. 7. 10 Geo. 1. c. 9. & 12 Geo. 1. c. 5.* are required and directed, all such casks of butter and tallow, as also the butter and tallow therein contained, shall be forfeited to any person who will seize the same and give information thereof to the mayor or other chief magistrate of the city or town-corporate where such custom-house or place of export lies, and in such places where there is no such mayor or chief magistrate to some neighbouring justice of the peace, who are hereby required within their respective jurisdictions to examine the same without loss of time. Any person may seize.

7. And if it shall appear upon oath, that the said casks of butter or tallow or any of them were intended for exportation, and that they are not branded as this and the said *former* acts require, such mayor, &c. shall declare and adjudge, without favour or affection, such casks and the butter and tallow therein contained to be forfeited, one moiety to the informer, and the other to the poor of the parish where such seizure shall be made. *f. 7.* Forfeited.

A warrant to levy the forfeiture for mixing old butter with new.

To the constable of——

County of } **F**ORASMUCH as it hath been duly proved before me this
——to wit, } day, upon oath, by A. B. of —— that C. D. of ——
did, on Wednesday last, being the second day of this instant August, at K. in
the county aforesaid, expose to sale to E. F. of —— two casks of butter
mixed with old and new butter, [or worked up with bay-salt instead of white,
and so forth, as the case is] contrary to the form of the statute in that case
made and provided; by reason whereof the said C. D. hath forfeited the sum
of ten shillings for every hundred weight of butter in the said casks; and it
hath also been proved before me this day, by the oath of the aforesaid A. B. that
there was in the said two tasks, two hundred weight of butter; wherefore, the
said forfeiture in the whole comes to the sum of twenty shillings: These are
therefore, in his Majesty's name, to command you forthwith to levy the said
sum of twenty shillings, on the goods and chattels of the said C. D. by distress
and sale thereof, rendering the overplus, if any be; and that you pay one moiety
thereof to the church-wardens of the parish of —— [where the offence
was committed] for the use of the poor of their said parish, and the other moiety
to the said A. B. who informed me of the said offence: Hereof fail not.
Given, and so forth.

A warrant to levy the penalty for selling casks of butter at other
tare than is branded.

To the constable of——

County of } **W**HEREAS A. B. of C. in the county aforesaid, hath
——to wit, } this present Day been duly convicted before me, upon
oath, for that he did on Wednesday last, being the second day of this instant
August,

Butter and Tallow.

August, at K. in the said county, sell unto D. E. of ——— twenty casks of butter, at greater or other tare than was branded on the said casks, [as the case is] contrary to the statutes in that case made and provided; by reason whereof, the said A. B. hath forfeited the sum of ten pounds: These are therefore, in his Majesty's name, to require you forthwith to levy the said sum of ten pounds on the goods and chattels of the said A. B. by distress and sale thereof, rendering the overplus, if any be, and that you pay one moiety thereof unto the said D. E. of ——— who informed me of the said offence, and the other moiety to the church-wardens of the parish of K. aforesaid, for the use of the poor of their said parish. Hereof fail not. Given, and so forth.

A warrant to levy the forfeiture on a weigh-master branding casks not made according to law.

To the Constable of ———

County of ——— to wit, } **F**ORASMUCH as it hath been duly proved before me this day, upon oath that A. B. of C. in the county aforesaid, a publick weigh-master, did, on the second day of this instant August, at C. aforesaid, weigh and brand four casks for packing of butter, not made and branded according to law, whereby he hath forfeited the sum of twenty shillings for each cask, wherefore the whole forfeiture comes to four pounds: These are therefore [as in the foregoing warrant.]

A warrant to levy the forfeiture for having more or less than twelve hoops on a tallow-cask.

To the constable of ——— and keeper of his Majesty's gaol at K.

County of ——— to wit. } **F**ORASMUCH as it hath been this day duly proved before me upon oath, that A. B. of C. in the county aforesaid, did, on the second day of this instant August, at C. aforesaid, sell [or expose to sale, or export, or attempt to export] one cask of tallow, whereon there were more [or less] than twelve hoops, [or, whereon the person's name, and place of abode, that made up the tallow, was not branded] contrary to the form of the statute; whereby he hath forfeited the sum of five shillings: These are therefore, in his Majesty's name, to command you forthwith to levy the said sum of five shillings on the goods of the said A. B. by distress and sale thereof, rendering the overplus; and that you pay one moiety thereof to C. D. of C. aforesaid, who informed me of the said offence, and the other moiety to the church-wardens of the parish of C. aforesaid [where the offence was committed], for the use of the poor of the said parish; and if no sufficient distress can be had, you are to take and apprehend the said A. B. and deliver him safely to the keeper of his Majesty's gaol at K. in the county aforesaid, to be kept there for ten days; and you the said keeper, are hereby required to receive the said A. B. and to keep him safely in your custody, during that time. Hereof fail not. Given, and so forth.

A warrant to levy the forfeiture for buying casks not branded by a weigh-master.

To the constable of —

County of —to wit. } **F**ORASMUCH as it hath been duly proved before me this day, upon oath, that A. B. of C. in the county aforesaid, did on the second day of this instant August, at C. aforesaid, buy of C. D. of E. in the said county, three barrels or casks for packing of butter, not weighed and branded by any publick weigh-master, contrary to the form of the statute; whereby he hath forfeited the sum of five shillings for each cask, wherefore the whole forfeiture comes to fifteen shillings: These are therefore, in his Majesty's name, to command you, forthwith to levy the said sum of fifteen shillings, on the goods of the said A. B. by distress and sale thereof, rendering the overplus; and that you pay one moiety thereof to E. F. of C. aforesaid, who informed me of the said offence, and the other to the church-wardens of the parish of C. aforesaid, for the use of the poor of the said parish. Hereof fail not. Given, and so forth.

The like warrant, *mutatis mutandis*, for selling casks not branded.

A warrant to levy the forfeiture for a weigh-master's marking casks falsely.

To the constable of —

County of —to wit. } **F**ORASMUCH as it hath been duly proved before me this day, upon oath, that A. B. of C. in the county aforesaid, weigh-master, [or deputy weigh-master] did, on the second day of this inst. August, at C. aforesaid, falsely mark ten casks, as containing more [or less] than the true weight, contrary to the form of the statute, whereby he hath forfeited the sum of ten shillings for every cask, wherefore the whole forfeiture comes to five pounds: These are therefore, [as in the last warrant.]

A warrant to levy the forfeiture for making up tallow in casks not branded.

To the constable of —

County of —to wit. } **F**ORASMUCH as it hath been duly proved before me this day, upon oath, that A. B. of C. in the county aforesaid, did, on the second day of this instant August, at C. aforesaid, make up one cask of tallow, and expose the same to sale [or attempt to export it] in a cask not

Butter and Tallow.

not branded by a publick weigh-master, contrary to the form of the statute, whereby he hath forfeited the sum of ten shillings: These are therefore, [as in the foregoing warrant.]

A warrant for levying the forfeiture, for buying casks of tallow or butter for exportation, not being weighed and branded by the weigh-master of the place.

To the constable of ———

County of } **F**ORASMUCH as it hath been duly proved before me this
——to wit. } day, upon oath, that A. B. of C. in the county aforesaid,
did, on the second day of this instant August, at C. aforesaid, buy two casks of
tallow [or, butter] for exportation, without being weighed and branded by the
publick weigh-master of the said place, contrary to the form of the statute,
whereby he hath forfeited the said tallow: [or, butter] these are therefore, in
his Majesty's name, to command you forthwith to seize the said two casks of tal-
low, [or butter] and to sell the same for the most you can get, and to pay one
moiety of the money arising thereby unto C. D. of C. aforesaid, who informed me
of the said offence; and the other moiety to the church-wardens of the parish of
C. aforesaid, for the use of the poor of the said parish. Hereof fail not. Given,
and so forth.

A warrant to levy the forfeiture, for packing butter or tallow in casks, that had been marked, without weighing the same a new.

To the constable of ———

County of } **F**ORASMUCH as it hath been duly proved before me, this
——to wit. } day, upon oath, that A. B. of C. in the county aforesaid,
did, on the second day of this instant August, at C. aforesaid, pack up butter
[or Tallow] in a cask, which had been formerly tried, marked and emptied,
without weighing, marking, and branding the same a-new, contrary to the
form of the statute, whereby he hath forfeited the sum of ten shillings: These
are therefore, in his Majesty's name, to command you, forthwith to levy the
said sum of ten shillings on the goods of the said A. B. by distress and sale
thereof, rendering the overplus; and that you pay one moiety thereof to C. D.
of C. aforesaid, who informed me of the said offence; and the other moiety to
the church-wardens of the parish of C. aforesaid, for the use of the poor of
the said parish: Hereof fail not. Given, and so forth.

A summons to the owner of butter, seized as unmerchantable.

To A. B. of ———

County of } **W**HEREAS C. D. weigh-master of the town of E. in
——to wit. } the county aforesaid, did, on the second day of this inst.
August,

Butter and Tallow.

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August, seize, and bring before me three barrels of butter [or tallow, or butter, or tallow-casks] as appearing unto him unmerchantable: These are therefore to inform you, that I intend to view and examine into the quality of the said goods, on the — Day of — at eleven of the clock in the forenoon, at my house, in — in the presence of two merchants, and two other persons, skilled in such commodities, where you may attend, if you think fit, to see whether the said goods will be condemned, or discharged. Dated this — Day of —.

Note, There must be ten days between the summons, and the day of trial.

A summons to two merchants, and two other persons, to view goods seized.

To A. B. C. D.

County of } **W**HEREAS there have been seized, and brought before
— to wit. } me three barrels of butter [or tallow, or butter or tallow-casks] as appearing unmerchantable: These are therefore to require you to meet me at my house, in — on the — day of — at Eleven of the clock in the forenoon, to view and examine the said goods, and to give your opinion, whether the same are merchantable or not. Dated (and so forth.)

A warrant to levy the forfeiture, for not attending on such summons.

To the Constable of —

County of } **W**HEREAS on the — Day of — I issued
— to wit. } my summons, directed to A. B. and C. D. merchants, and E. F. and G. H. requiring them to appear at my house, in — on the — day of — at eleven of the clock in the forenoon, to view and examine three barrels of butter, [or tallow, or butter or tallow-casks] seized and brought before me as unmerchantable; and the said A. B. neglected to appear, although duly summoned, as appeared to me, upon oath, whereby the said A. B. hath forfeited the sum of ten shillings: These are therefore, in his Majesty's name, to command you forthwith to levy the said sum of ten shillings on the goods of the said A. B. by distress and sale thereof, rendering the overplus; and that you pay the same to the church-wardens of the parish of — for the use of the poor of the said parish: Hereof fail not. Given (and so forth.)

A warrant to levy the forfeiture on coopers, for not branding butter-casks, or making casks of wood not allowed by law.

To the constable of —.

County of } **F**ORASMUCH as it hath been duly proved before me this
— to wit. } day, upon oath, that A. B. of C. in the county aforesaid,
Q 2 cooper,

Butter and Tallow.

cooper, hath lately at C. aforesaid, made ten casks for packing of butter, for sale or export, and did not brand on the said casks the first letter of his christian-name, and his fir-name at length, and the place of his abode, as the statute directs, [or, made ten casks for packing of butter, for sale or export, of wood not allowed of by law] whereby he hath forfeited the sum of five shillings for each cask; wherefore the whole forfeiture comes to fifty shillings: These are therefore, in his Majesty's name, to require you forthwith to levy the said sum of fifty shillings on the goods of the said A. B. by distress and sale thereof rendering the overplus; and that you pay one moiety thereof to C. D. of C. aforesaid, who informed me of the said offence; and the other moiety to the church-wardens of the parish of C. aforesaid, for the use of the poor of the said parish: Hereof fail not.. Given (and so forth.)'

A warrant to levy the forfeiture on a weigh-master, for weighing and branding butter-casks, not made and branded by the cooper, according to law.

To the constable of ———.

County of } **F**ORASMUCH as it hath been duly proved before me this
——to wit. } day, upon oath, that A. B. weigh-master of C. in the county aforesaid, did, on the second day of this instant August, at C. aforesaid, weigh and brand ten casks for packing of butter, not branded [or not made] by the cooper, according to law, whereby he hath forfeited the sum of twenty shillings for each cask; wherefore the whole forfeiture comes to ten pounds: These are therefore [as in the next foregoing warrant.]'

A warrant to levy the forfeiture for a weigh-master, branding butter or tallow-casks with numeral letters.

To the constable of ———.

County of } **F**ORASMUCH as it hath been duly proved before me this
——to wit. } day, upon oath, that A. B. weigh-master of C. in the county aforesaid, hath branded the tare on three tallow [or butter] casks, by marking the same with numeral letters, contrary to the form of the statute, whereby he hath forfeited the sum of five shillings for each cask; wherefore the whole forfeiture comes to fifteen shillings: These are therefore [as in the foregoing warrant.]'

A warrant to levy the forfeiture on a cooper, buying butter at the weigh-house where he is employed.

To the constable of ———.

County of } **F**ORASMUCH as it hath been duly proved before me this
——to wit. } day, upon oath, that A. B. who is the cooper [or who is]
em-

Butter and Tallow.

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employed at the weigh-house, for weighing butter and tallow, in the town of C. in the county aforesaid, did on the second day of this instant August, buy [sell, contract, or treat for] one cask of tallow, [or butter] at the weigh-house where he is employed, contrary to the form of the statute, whereby he hath forfeited the sum of twenty shillings: These are therefore [as in the foregoing warrant.]'

A warrant to levy the forfeiture on a weigh-master, for buying butter, tallow, or hides.

To the constable of —.

County of } **F**ORASMUCH as it hath been duly proved before me this
— to wit. } day, upon oath, that A. B. weigh-master for the town of
C. in the County aforesaid, did, on the second day of this instant August, at
C. aforesaid, buy [sell, contract, or treat for] one cask of tallow, [or butter,
or two green or salt hides] at his weigh-house aforesaid, whereby he hath for-
feited the said goods: These are therefore, in his Majesty's name, to command
you forthwith to seize the said cask of tallow, [or butter, or the said two
green or salt hides] and to sell the same for the most you can get; and to pay
one moiety thereof to C. D. of C. aforesaid, who informed me of the said of-
fence; and the other moiety to the church-wardens of the parish of C. aforesaid,
for the use of the poor of the said parish: Hereof fail not. Given (and
so forth.)

Buying of Titles.

I. By the common law.

II. By statute.

I. By the common law.

IT seemeth to be an high offence at common law, to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate; and it seemeth not to be material, whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. *Haw. 261.*

Doubtful titles to lands disputed.

II. By

II. By statute.

Persons of the King's house.

1. By the statute of 13 Ed. 1. c. 49. *No person of the king's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and seller being punished at the king's pleasure.*

Pretenced titles.

2. By 10. Car. 1. sess. 3. c. 15. *None shall buy any pretended right in any land, unless the seller hath taken the profit thereof one year before; on pain that the seller shall forfeit the land, and the buyer the value, half to the king, and half to him that shall sue within one year.* f. 2, 6.

Lawful possession.

Pretenced title] But he who is in lawful possession may purchase the pretended title of any others. 32 H. 8. c. 9. f. 4.

One year before.

One year before] But no conveyance made by one who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of this statute. 1 Haw. 265.

3. *And the offence of buying of titles may be laid in any county, at the pleasure of the informer.* 31 El. c. 5. f. 4.

English statutes.

By the 10 Car. 1. sess. 3. cap. 15. sect. 1. *All statutes heretofore made in England concerning maintenance, champerty, and embracery, now in force, shall be put in execution in Ireland.*

Carriers.

Carrier, who

1. **A**LL persons carrying goods for hire, as masters and owners of ships, lightermen, stage coachmen, and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm, for their faults or miscarriages. 1 Bac. Abr. 343.

Taking or damaging goods.

2. 28 Hen. 8. cap. 22. sect. 7. *If any persons take upon them the carrying or conveying of any wine, goods, or merchandises by land, in cart, wain, or otherwise, and do take or wilfully perish any cask or parcel of any such wines, goods, or merchandises to them delivered, to be carried or transported to any place of this dominion by land, they shall forfeit to the owners of the said wines, goods, or merchandises, as often as they shall offend, as much money as they should have for the freight, conveying and carriage of all wines, goods, and merchandises, to them at that time delivered, to be conveyed or carried either by water or by land, and the treble value of that they take or wilfully perish of the said wines, goods, or merchandises, and over that to forfeit five pounds, the one moiety thereof to the king, and the other moiety to the party that will sue for the same, in any of the king's courts by action of debt or otherwise, wherein no essoin, &c. shall be allowed.*

Forfeit treble value.

Prices of carriage.

None of the persons before named shall take or receive any sums of money, or any other thing for the freight, carriage, or conveying of any merchandises, but such wages as they in time passed have been most commonly

monly accustomed to receive for the freight and carriage of any such goods or merchandises, upon pain to the taker as often as he shall offend in the same, thirteen shillings four-pence, the one half thereof to the king, and the other half to the party that will sue for the same in any of the king's courts, or before the king's commissioners, by action of debt or otherwise, wherein no effoign, &c. shall be allowed. *f. 8.*

And he shall not evade the law, by refusing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. *1 Bac. Abr. 344.*

So an action will lie against a common ferryman, who refuseth to carry passengers. *id.*

But if the porter puts up the box of a passenger behind a stage coach, and the master as soon as he knows of it says, that he is already full, and refuses to take the charge of it, the master shall not be liable. For this is the same with an host who refuseth his guest, his house being full, and yet the party says he will shift, or the like, if he be robbed, the host is discharged. *id.*

So a carrier may refuse to admit goods into his warehouse at an unreasonable time, or before he is ready to take his journey; but he cannot refuse to do the duty incumbent upon him by virtue of his publick employment. *L. Raym. 652.*

3. No carrier with any horse or horses, nor waggon-man, carman, or wain-man, with their respective carriages, shall by themselves, or any other, travel on the lord's day; on pain of 20*s.* on conviction in six months, before one justice, (or mayor) on view, or confession, or oath of two witnesses, to be levied by the constable or church-wardens by distress; to the use of the poor, except that the justice may reward the informer with any sum not exceeding a third part. *7 Will. 3. cap. 17.*

4. It hath been holden, that a carrier imbezilling goods which he has received to carry to a certain place, is not guilty of felony, because there was not a felonious taking; but is liable only to a civil action. *1 Haw. 89, 90.*

5. But it hath been resolved, that if a carrier open a pack, and take out part of the goods, with intent to steal it, he may be guilty of felony; in which case it may be said, not only that such possession of a part distinct from the whole, was gained by wrong, and not delivered by the owner; but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. *1 Haw. 90.*

6. Also it seems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again secretly, with intent to steal them, he is guilty of felony; because the possession, which he received from the owner, being determined, his second taking is in all respects the same, as if he were a meer stranger. *1 Haw. 90.*

7. Also it hath been resolved, that if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and disposeth of them to his own use, that this is felony; because this declareth that his intention originally was not to take the goods, upon the agreement and

and contract of the party, but only with a design of stealing them. *Kelynge*. 82.

Carrier robbed. 8. Where goods are delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, by reason of the hire: And this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner, that no proof could be had of it. *1 Salk. 143.*

And altho' it may be thought a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable, if he were not so: for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. *12 Mod. 482.*

Otherwise losing or damaging goods. 9. And generally, if a man delivers goods to a common carrier, to carry to a certain place; if he loses or damages them, an action upon the case lies against him; for by the custom of the realm, he ought to carry them safely. *1 Bac. Abr. 343.*

And if he be a common carrier, tho' there be no agreement, or rate settled, or promise of payment; yet he shall recover his hire on a *quantum meruit*, and therefore shall be liable for loss and damages. *id.*

Also if a person, who is no common carrier, takes upon himself to carry my goods, tho' I promise him no reward, yet if my goods are lost or damaged by his default, I shall have an action against him. *id.*

For the very taking of the goods is a general consideration, tho' he be not a common carrier: and the acceptance of the goods makes him liable. *Show. 104.*

Goods delivered to the carrier's servant. 10. A delivery to the carrier's servant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and lost, an action will lie against the carrier. *Read. Car.*

How far it is necessary that the carrier should know what the goods are. 11. If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases the carrier is not liable. *Str. 145.*

If a man delivers a box to a carrier to carry, and he asks what is in it, and the man tells him, a book and tobacco (as the case was) and in truth there is 100*l.* besides; yet if the carrier is robbed, he shall answer for the money: for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance. *1 Bac. Abr. 345.*

But if a person, being a common carrier, receives by his book-keeper from another man's servant, two bags of money sealed up, containing as was told him 200*l.* and the book-keeper gives a receipt for his master to this effect, Received of such a one two bags of money sealed up, said to contain 200*l.* which I promise to deliver on such a day at such a place unto such a person, he to pay 10*s.* per cent. for carriage and risque; tho' the bags contain 400*l.* and the carrier is robbed, he shall be answerable only for 200*l.* for this is a particular undertaking; and as it is by reason of the reward

ward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reasonable he should be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A man took a place in a stage coach, and in the journey the defendant by negligence lost the plaintiff's trunk: upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promised to take care of it, but lost it: *Holt* chief justice held, that the master was not chargeable, and that a stage coachman is not within the custom as a carrier is, unless the master takes a distinct price for the carriage of the goods, as well as of the persons. 1 *Salk.* 282.

But by the custom and usage of stage coaches, every passenger uses to pay for the carriage of goods above such a weight; and in such case the coachman shall be charged for the loss of goods beyond such weight. *Comyn.* 25.

12. Where goods are stolen from a carrier, he may prefer an indictment against the felon, as for his own goods; for tho' he has not the absolute property, yet he has such a possessory property, that he may maintain an action of trespass against any one who takes them from him, and so may indict a thief for taking them; and the indictment were good also, if it had been brought by the real owner. *Kelynge.* 39.

Carrier may indict for goods stolen as his own property.

13. And there is a special case, wherein it is said, that a man may commit larceny by stealing his own goods delivered to the carrier, with intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect whereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods, and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner. 1 *Haw.* 94.

Person stealing his own goods from the carrier.

Cattle.

So much of this title as concerns butchers in particular, may be seen under title **Butchers.**

I. Concerning the bringing of cattle into England.

II. Buying and selling of cattle.

III. Stealing, killing, or maiming of cattle.

I. Concerning the bringing of cattle into England.

AND if any shall be imported, any person may seize them, and keep them 48 hours; and if in that time, it be made appear to a justice, on the oath of two witnesses, that they were not imported from *Ireland*, nor from any other place beyond sea, then they shall be delivered on warrant of such justice; but in default of such proof and warrant, then to be forfeited. *En. st.* 18. C. 2. c. 2. *En. st.* 32 C. 2. c. 2.

Cattle from Ireland.

And the seizer, within six days after the conviction and forfeiture, shall cause them to be killed; the hides and tallow he shall have himself, the rest

Seized and killed.

R

shall

Cattle.

shall go to the poor, to be distributed by the church-wardens and overseers.
En. st. 32 C. 2. c. 2.

Disposal of the
forfeiture.

And the seizers, church-wardens, or overseers neglecting their duty herein, shall forfeit 40*s.* for every one of the great cattle, and 10*s.* for sheep and swine; half to the poor, and half to the informer, by warrant of one justice, by distress; for want of distress, commitment for three months. *En. st. 32 C. 2. c. 2. s. 6.*

Ship forfeited.

And the ships bringing the same shall be forfeited, and any person may seize and sell them, half to the poor, and half for himself. *En. st. 20 C. 2. c. 7.*

And a justice of the peace may by warrant apprehend the seamen, and all others concerned, and commit them to gaol for three months. *20 C. 2. c. 7.*

Penalty for not
seizing.

And if no seizure is made in the district where they are first imported, such place shall forfeit 100*l.* to the use of the house of correction. *En. st. 20 C. 2. c. 7.*

Collusion.

And if the cattle come by collusion of officers, or otherwise, into any other than the first district, they may be seized there in like manner. *En. st. 20 C. 2. c. 7.*

Præmunire.

And persons confederating to elude this act, shall incur a præmunire. *En. st. 20 C. 2. c. 7.*

And also, cattle once seized, and afterwards found in another district, may be re-seized there. *En. st. 32 C. 2. c. 2. s. 10.*

Mixed with
English
cattle.

And *English* cattle intermixed in a drove with *Irish* cattle, may be seized as *Irish* cattle. *En. st. 32 C. 2. c. 2. s. 11.*

But, finally, by *Br. st. 32 G. 2. c. 11.* these restrictions are taken off for a time, and thereby it is enacted, that all sorts of cattle may be imported from *Ireland*, duty free, for five years.

II. Buying and selling of cattle.

Buying cattle
to sell again.

1. 2 Ann. cap. 15. sect. 5. No person who shall buy cattle or sheep in any market or fair in this kingdom, shall sell or expose the same cattle or sheep to sale again in the same market or fair on the same day, on pain of forfeiting the full value of all such cattle or sheep so sold or exposed to sale contrary to this statute? the one moiety of which forfeiture to be to the Queen, &c, the other moiety to them who will sue for the same.

Giving earnest.

2. If any persons in any market or fair or elsewhere, do give or strike earnest for any beast or parcel of cattle or sheep, if the person that offers to sale the said cattle, do not, after the striking and receiving the said earnest, declare that it is a bargain, and that he is content to keep the earnest, it shall be lawful for such person to sell the same to any other person, notwithstanding such earnest remaining in his hands; and no master or wardens of any corporation or fraternity of butchers, shall by virtue of any by-law of their corporation or fraternity, punish or fine any freeman or other person for buying or selling any such beast, cattle, or sheep, where earnest was laid down; and was declared to be agreed to and accepted as earnest. *sect. 6.*

3. And

3. And no magistrate or justice of the peace shall order or adjudge the seller of any such cattle, to stand to any bargain to which he did not declare such his assent, after earnest struck or laid in his hands as aforesaid, on pain to forfeit five pounds for every such offence; the one half of this penalty to be to her Majesty, &c. the other half to them that shall sue for the same. Declaring assent.

4. It shall be lawful for the justices of the peace of the several counties at their respective quarter-sessions, to hear and determine all the offences aforesaid, and upon the convictions of such offenders before them, to make extracts of the one moiety of the said forfeitures into the exchequer, as had been used to be done in case of other fines and amercements, forfeited to her Majesty in the sessions of the peace, and to award and issue forth execution for the other moiety due by this act to the informer or prosecutor by *capias* or *fieri facias* out of the said court of sessions, in such sort as the Queen's-bench at *Dublin* have in such cases used to do. Quarter-sessions to hear offences.

5. Provided that no person shall be sued for any offence against this act, unless such prosecution shall be begun within six kalendar months next after the offence committed.

6. If upon any prosecution grounded upon this act, it shall appear to the judges or justices of the peace before whom such information shall be presented, that such information or prosecution was promoted only for vexation, and without any reasonable cause, the said judges or justices of the peace shall award the party so unjustly prosecuted, treble costs occasioned by such vexatious prosecution, the same to be recovered by *capias* or *fieri facias*. Vexatious prosecution.

This statute is made perpetual by Stat. 9 Ann. cap. 7.

7. 7 Will. 3. cap. 17. No drover, horse-courser, butcher, higler, or any of their servants, shall travel or come into their inn or lodging upon the Lord's-day, upon pain that every such offender shall forfeit twenty shillings. Traveling on Sunday.

8. And if any person offending against this act, shall be thereof convicted before any justice of the peace or chief officers where the offence shall be committed, upon their view or confession of the party, or proof of one witness by oath, the said justice or chief officer shall give warrant to the constables or church-wardens of the parish where such offence shall be committed, to levy the other forfeitures by distress and sale of the goods of every such offender, &c. and in default of distress, or in case of inability of the offender to pay the said forfeitures, the party offending shall be set publicly in the stocks two hours, and all the forfeitures aforesaid shall be employed to the use of the poor of the parish, where the said offences shall be committed, saving that it shall be lawful for any justice, mayor, or head officer, out of the said forfeitures, to reward persons that shall inform of any offence against this act, so as such reward exceed not the third part of the forfeitures or penalties. Conviction. Setting in the stocks.

III. Stealing, killing, or maiming of cattle.

9. 9 Ann. cap. 11. If any person shall maliciously and willingly maim, kill, or destroy any horses, sheep, cows, or other cattle, every such offence shall Maiming or killing cattle.

- shall be adjudged felony, provided nothing herein contained shall extend to the gelding stone-horses going at large.
- Felony without clergy.** 10. 2 Geo. 1. cap. 22. sect. 1. Where any person shall be convicted of malicious and wilful maiming, killing, or destroying any horses, sheep, cows, or other cattle, according to Stat. 9 Ann. cap. 11. to prevent the maiming of cattle, such persons duly convicted, shall suffer death as in cases of felony without the benefit of clergy.
- Stealing the fat, &c.** 11. 17 Geo. 2. cap. 5. sect. 1. Every person who shall kill, cut, open, or skin, any bull, ox, cow, steer, bullock, heifer, calf, sheep, or lamb, or any horse, mare, gelding, colt, filly, ass, or mule, with an intent to steal the whole or any part of the fat, flesh, skin, or carcass thereof, or shall thereout take the fat, or take away any part of the flesh, or carcass, or skin thereof, with an intent to steal the same, or shall maliciously kill, maim, or wound, with an intent to destroy any one or more of the cattle aforesaid, and their accessories before the fact, and every person who shall receive or buy any tallow, fat, or sewet, or the skin, or carcass, or any part thereof, of any such cattle, from such offenders knowing the same to be so unlawfully taken, thereof convicted, shall suffer death as in cases of felony without benefit of clergy, or of any statute.
- Receivers knowingly.** 12. It shall be lawful for the grand juries of the respective counties at the assises, and for the grand juries of the county of *Dublin*, and county of the city of *Dublin*, at their quarter-sessions, to raise by presentment, as other county charges are raised, such sums as they shall think fit, not exceeding five pounds for each offender convicted of any the offences aforesaid, to be paid as a reward to any persons who shall discover and prosecute to conviction any such offender; and in case there shall be two or more concerned in the discovery, &c. the justices before whom such offenders shall be tried and convicted, may apportion such money amongst such discoverers or prosecutors in such shares as they shall think fit.
- Reward for convicting.** 13. If any persons who shall be guilty of any the offences aforesaid, shall within ten days after such offence committed, and before his or her conviction, first discover one or more of his or her accomplices therein, so as such accomplice or accomplices be convicted of such offence, the offender so first discovering, shall be clearly acquitted and discharged of such offence, and shall be intitled to the reward, or such share thereof, as any other discoverer might be intitled unto by this act.
- Discovering accomplices.** 14. 29 Geo. 2. cap. 12. sect. 3. If any person shall be procuring, aiding, or assisting in the wilful or malicious killing, maiming, or haughing any horses, horned cattle, or sheep, every person so offending, being lawfully convicted, shall be adjudged guilty of felony, without benefit of clergy.
- Aiding or procuring, &c.** 15. Any person who shall discover and prosecute to conviction any such felon, shall be intitled to a reward of ten pounds, to be recovered as aforesaid, against the inhabitants of the barony in which such felony shall be committed; and if such discoverer and prosecutor be a party concerned in such felony, he shall not only be intitled to the said reward of ten pounds, but be intitled to his pardon for any felony before that time, by him or her committed against this act. Sect. 8.
- Reward for discovering.**

A Certiorari is an original writ, issuing out of the court of chancery or the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *certify* or to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice, before the king or such justices as he shall assign to determine the cause. 1 *Bac. Abr. Certior. A.*

Certiorari, what.

Also, the justices of the peace may deliver or send into the king's bench, indictment found before them, or recognizances of the peace taken before them, or force recorded by them, without any certiorari. *Dalt. c. 195.*

What things may be certified without a writ of certiorari.

Concerning which writ of certiorari, it is here shewn,

I. In what cases it is grantable.

II. How to be granted and allowed.

III. The effect of it.

IV. The return of it.

I. In what cases it is grantable.

1. A certiorari lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all inferior jurisdictions erected by act of parliament, to have their proceedings returnable in the king's bench.

In cases where a writ of error lies not.

L. Raym. 469, 580.

2. And therefore a certiorari lies to justices of the peace, even in such cases, which they are impowered by statute finally to hear and determine; and the superintendency of the court of king's bench is not taken away without express words. 2 *Haw. 286.*

Where not specially prohibited by statute.

3. But it seems agreed, that a certiorari shall never be granted to remove an indictment after a conviction, unless for some special cause; as where the judge below is doubtful what judgment to give. 2 *Haw. 288.*

After conviction.

And, *E. 18 G. 2. K. and Nicolls.* An indictment was removed into the court of king's bench by certiorari, after conviction, and before judgment. Upon which a doubt arose what the court could do, the certiorari being brought before judgment; and this court not being apprized of the circumstances of the offence, could not tell what judgment to give: and in *Carth. 6.* it is said, they cannot give judgment. A rule therefore was made, to shew cause why the certiorari should not be quashed, so as to remit it back to the sessions; which was afterwards made absolute. *Str. 1227.*

4. Also, it seems a good objection against the granting a certiorari, that issue is joined in the court below, and a *venire* awarded for the trial of it. 2 *Haw. 288.*

After issue joined.

5. It hath been adjudged, that wherever a certiorari is by law grantable for an indictment, the court is bound of right to award it at the instance of the king, because every indictment is the suit of the king, and he has a prerogative of suing in what court he pleases. But it seems to be agreed, that it is left to the discretion of the court, either to grant or deny it at prayer of the defendant. 2 *Haw. 287.*

Where the court is bound of right to grant it.

6. And

Certiorari.

6. And it seems that the court will not ordinarily, at the prayer of the defendant, grant a certiorari for the removal of an indictment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the certiorari might delay, if not wholly discourage the prosecution. 2 Haw. 287.

II. How to be granted and allowed.

How to be granted on indictment or presentment.

1. On indictment or presentment: By the 8 Ann. cap. 5. sect. 1. it is enacted, that in term time, no writ of certiorari, at the prosecution of any party indicted, shall be granted out of the king's bench, to remove any indictment or presentment of trespass or misdemeanor, before trial had, from before the justices, in sessions; unless such certiorari shall be awarded upon motion of counsel, and by rule of court made for the granting thereof.

In vacation time.

But in the vacation, writs of certiorari may be granted by any justice of the king's bench; whose name shall be indorsed on the writ, and also the name of the person at whose instance it is granted.

Recognizance before allowance.

And all the parties indicted, prosecuting such certiorari, shall before the allowance thereof, find two sufficient manucaptors who shall enter into a recognizance before a justice of the king's bench (who shall indorse the same on the writ), or before a justice of the peace of the county or place, in the sum of 20 l. with condition, at the return of the writ, to appear and plead to the said indictment or presentment, in the said court of king's bench, and at his own costs and charges to cause and procure the issue that shall be joined thereupon, or any plea relating thereunto, to be tried at the next assizes for the county wherein the indictment or presentment was found, after such certiorari shall be returned, or the next term if in the said county or city of Dublin, unless the court shall appoint another time, and if so, then at such other time; and to give due notice of such trial, to the prosecutor or his clerk in court; and also that the party prosecuting the writ of certiorari, shall appear from day to day, in the said court of king's bench, and not depart until he shall be discharged by the court.

Notice of trial.

Certified into the king's bench.

And the said recognizance shall be certified into the king's bench, with a certiorari and indictment, to be there filed, and the name of the prosecutor (if he shall be the party grieved), or some publick officer, shall be indorsed on the indictment.

Costs to be awarded.

And if the defendant prosecuting the writ of certiorari, be convicted of the offence for which he was indicted, then the court of king's bench shall give reasonable costs to the prosecutor, to be taxed according to the course of the said court, who shall for the recovery thereof, within ten days after demand and refusal of payment, on oath, have an attachment awarded; and the recognizance not to be discharged till the costs are paid.

Trial notwithstanding certiorari.

But if the person procuring the certiorari, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound as aforesaid, the justices may proceed to the trial of the indictment in sessions, notwithstanding the writ of certiorari delivered.

At the prosecution of any party indicted] This extends only to certiorari's procured by persons indicted; from whence it follows, that those which are procured

procured by the prosecutor of an indictment, remain as they were at common law. 2 *Haw.* 292.

To be tried at the next assizes] But the recognizance shall not be forfeited, unless the prosecutor give rules according to the course of the court. 2 *Haw.* 293.

Reasonable costs] The master of the crown office, in taxing the costs, ought only to consider those which are subsequent to the certiorari. 2 *Haw.* 292.

May proceed to the trial] Nevertheless they must make a return to the certiorari, otherwise they will be in contempt to the court; for all writs must be obeyed, unless good cause be shewn to the contrary; and the proper way of shewing it is to return it. 2 *Haw.* 292.

E. 1. An. A rule was made in the court of king's bench, that no certiorari should be granted to remove orders of justices, from which the law has given an appeal to the sessions; before the matter be determined on the appeal, because it hinders the privilege of appealing; and that if any order be removed before appeal, it should be sent down again: But if the time of appeal be expired, that case is not within the rule: By *Holt* Ch. J.—But afterwards, *M. 4 An.* in the case of *Sbellington*, it was held, that advantage must be taken of this rule upon the motion to file the order; for that after it is filed, it is too late. 1 *Salk.* 147.

III. The effect of it.

1. After a certiorari is allowed by the inferior court, it makes all the subsequent proceedings on the record that is removed by it erroneous. 2 Subsequent proceedings void. *Haw.* 293.

2. But it hath been adjudged, that if a certiorari for the removal of an indictment before justices of the peace be not delivered, before the jury be sworn for the trial of it, the justices may proceed. 2 *Haw.* 294. Except where the jury is sworn.

3. And the justices may set a fine to compleat their judgment, after a certiorari delivered. *L. Raym.* 1515. And after judgment.

4. A certiorari removes all things done between the teste and return. *L. Raym.* 835, 1305. Removes all after the teste of it.

5. A certiorari removes the record it self out of the inferior court; and therefore if it remove the record against a principal, the accessory cannot there be tried. 2 *Haw.* 325. Removes the record itself.

6. It hath been holden, that a certiorari for the removal of a recognizance for the good behaviour, or an appearance at sessions, will supersede the obligation of it: but this would be highly inconvenient, and the contrary seems to be supported by the better authority. 2 *Haw.* 292. How far it supercedes the obligation of a recognizance.

7. If a *supersedeas* come out of a superior court, to the justices, they ought to surcease, altho' the *supersedeas* be awarded against law; for they are not to dispute the command of a superior court, which is a warrant to them. *Crom.* 129. Case where it is awarded against law.

IV. The

IV. The return of it.

Return of the certiorari.

1. Every return of a certiorari ought to be under seal. 2 *Haw.* 294.2. And altho' the *custos rotulorum* keep the records, yet must the justices, to whom it is directed, return the certiorari; and therefore if it is directed to the justices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.3. The certiorari may be sometimes to remove and send up the record it self, and sometimes but only the tenor of the record (as the words therein be) and it must be obeyed accordingly. *Dalt. c.* 195. 2 *Haw.* 295.4. A return was in paper, and for that reason held not good. 4 *W. K. B. Nelf.* 178.

Return insufficient.

5. Upon a certiorari to remove an indictment of a riot, or forcible entry, or the like, the return must have these words, *as also to hear and determine divers felonies, &c.* according to the commission; for if the return mentions only that they are justices of the peace, without such words, the return is insufficient. *Dalt. c.* 195.

False return.

6. If the person to whom a certiorari is directed, do make a false return, yet the court will not stay filing it on affidavit of its being false, except in publick cases, as in cases of commissioners of sewers, or for not repairing highways, or for some such special causes; because the remedy for a false return is either an action on the case at the suit of the party grieved, or an information at the suit of the king. *Dalt. c.* 195.

Alias and pluries.

7. If the person to whom the certiorari is directed, do not make a return, then an *alias*, that is, a second writ; then a *pluries*, that is, a third writ, or *causam nobis significes*, shall be awarded, and then an attachment. *Crom.* 116.

Besides these general rules, in common to all certioraries, there are many times special directions about granting, and allowing or not allowing them, in particular cases, which are treated of under their respective titles; such as highways, game, tithes, swearing, and many others.

The return of a certiorari may be thus:

First, On the backside of the writ indorse these or the like words:

The execution of this writ appears in a schedule to the same writ annexed.

And that schedule may be thus, on a piece of parchment by itself, and filed to the writ:

County of } **I** P. M. esq; one of the keepers of the peace and justices of our
 Dublin. } lord the king, assigned to keep the peace within the said county,
 and also to hear and determine divers felonies, trespasses, and other misdemean-
 ors in the same county committed, by virtue of this writ to me delivered, do under
 my seal certify unto his Majesty in his court of king's bench, the indictment, of
 which mention is made in the same writ, together with all matters touching
 the same indictment. In witness whereof, I the said P. M. esq; have to these
 presents set my seal. Given at— in the said county, the— day of—
 in the— year of the reign of—

Then take the record of the indictment, and close it within the schedule, and seal and send them up both together with the certiorari.

Of

Of cheats punishable by publick prosecution, there are two kinds,

I. By the common law.

II. By statute.

I. By the common law.

1. **C**HEATS which are punishable by the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. *1 Haw. 188.* Cheats by common law.

2. It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which, common prudence and caution may be a sufficient security. *1 Haw 188.* False pretences.

3. A person for a counterfeit pass, was adjudged to the pillory, and fined. *Dalt. c. 32.*

4. On an indictment against the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn instead of it, it was moved to quash the same, because it is only a private cheat, and not of a publick nature. It was answered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court unanimously agreed not to quash it. *T. 16 G. 2. K. and Wood. Sess. C. V. 1. 217.* Cheats in trade.

5. A person falsely pretending that he had power to discharge soldiers, took money of a soldier to discharge him; and being indicted for the same, the court held the indictment to be good. *T. 3 C. Serlestead's case. 1 Latch 202.*

6. As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally: Thus if a minor goes about the town, and pretending to be of age, defrauds many persons by taking credit for considerable quantities of goods, and then insisting on his non-age; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl. 100.* Frauds punished civilly.

II. By statute.

False tokens or
letters,

1. By the *En. st. 33 H. 8. c. 1.* If any person shall falsely and deceitfully obtain, or get into his hands or possession, any money, goods, chattels, jewels, or other things, of any person, by colour and means of any false privy token, or counterfeit letter made in another man's name; and shall be convicted thereof, by examination of witnesses, or confession, before the justices of assize, in their circuits, or before the justices of peace within any part of the King's dominions in their general sessions, or by action in any court of record; he shall have such punishment by imprisonment, pillory, or other corporal pain (except death) as the court shall appoint. Saving to the party grieved such remedy by action or otherwise, for the goods so obtained, as he might have had by the common law.

And two justices (1. Q.) may call and convent by process or otherwise (A), to the assizes or sessions, any person suspected, and commit or bail him to the next assizes or sessions.

Get into his hands or possession] A person endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on suspicion of such fraud, before he hath got the goods into his possession, seems not to be within this statute. *E. 3 G. 2. K. and Brian. Sess. C. V. 2. 27.*

False privy token] On motion to quash an indictment, which was, that the defendant came pretending that such a person had sent him to receive 20 l. and received it, whereas such person did not send him: By the court, It is not indictable, unless he came with *false tokens*; for we are not to indict one man for making a fool of another. *Black. 79.*

H. 13 G. 2. K. and Munoz. It was adjudged, that an indictment averring the offence to be by false tokens, without shewing what those false tokens are, is not sufficient; and that the fraudulently procuring a note from a person, by falsely affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no such person in the next room, is not a *false token*, but a false affirmation only. *Sess. C. V. 2. 201. Str. 1127.*

Note; The statute says, a false *privy token*.

Corporal pain] Lord Coke observes hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. *3 Inst. 133.*

But Mr. *Hawkins* observes, that there is a precedent in *Cro. Car. 564.* by which it appears, that one convicted on such a prosecution hath been adjudged not only to stand on the pillory, but also to pay a fine of 500 l. and to be bound with good sureties to the good behaviour. *1 Haw. 188.*

Commit on bail him] In this case the justices shall do well to take examination of the offence, and to certify the same to the sessions or gaol delivery, and withal to bind over the informers and witnesses to give evidence therein. *Dalt. c. 32.*

A. Warrant of two justices to apprehend an offender; on
33 H. 8. c. 1.

County of *Dublin* } To the constable of——

WHEREAS complaint hath been made unto us whose names and seals are hereunto set, two of his Majesty's justices of the peace for the said county, and one of us of the quorum, upon the oaths of A. I. of—— yeoman, and B. I. of—— yeoman, that on the—— day of—— A. O. of—— yeoman, did by a false privy token [or, counterfeit letter] that is to say, by [here particularize the offence] falsly and deceitfully obtain and get into his hands and possession [here mention the things] from C. I. of—— contrary to the statute in that case made: These are therefore to command you, upon sight hereof, forthwith to bring the said A. O. before us at—— on the—— day of—— to answer to the said complaint, and farther to be dealt withal according to law. Given under our hands and seals the—— day of——.

Church and Church Yard.

1. **T**HE ancient Saxon word is *cyrce*, the Danish *kircke*, the Belgick Derivation. *kercke*, the Cimbric *kirchia* or *kurk*; probably from the Greek word *κυριακόν*, belonging to the Lord, or *κυρεῖος*, the Lord's house; so that we have lost the ancient pronounciation of the word (except in the northren parts of *England*, and in *Scotland*) by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient *Greeks* and *Romans* always pronounced hard, as the letter *k*.

2. *No fairs nor markets shall be kept in church-yards.* Eng. ft. 13 Ed. Fairs, &c. 1. ft. 2. c. 6.

3. *Clergymen shall not be arrested, and drawn out of any church or church yard, whilst they attend to divine service; on pain of imprisonment of the offender, and ransom at the king's will, and satisfaction to the party arrested.* Eng. ft. 50 Ed. 3. c. 5. Eng. ft. 1 R. 2. c. 15.

Also it is said, that arrests in civil cases ought not to be of persons going to or coming from church; but that a warrant from a justice of the peace for the king may be executed in such case. *Cro. Car.* 602. *Cro. Ja.* 321. 2 *Bulstr.* 72.

But altho' the officer may be punished for the same either in the spiritual or temporal courts, yet the arrest (if not on a Sunday) is good in law. *Watson c.* 34. p. 344.

4. *If any person shall, by words only, quarrel, chide, or brawl, in any church or church-yard, the bishop (on proof of two witnesses) may suspend every lay-man, being an offender, ab ingressu ecclesiæ; and every clergyman from the ministration of his office, so long as he shall think meet.* Eng. ft. 5 & 6 Ed. 6. c. 4 f. 1.

Church and Church Yard.

5. *If any shall smite, or lay any violent hands on another in any church or church-yard, he shall be deemed ipso facto excommunicate, and be excluded from the fellowship and company of Christ's congregation.* Eng. ft. 5 & 6 Ed. 6. c. 4. f. 2.

Lay any violent hands] But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of this statute. 1 Haw. 139.

Shall be deemed ipso facto excommunicate.] And he shall not excuse himself by shewing that the other assaulted him. 1 Haw. 139.

Ipso facto] Nevertheless, in this and other like cases, there ought either to be a precedent conviction at law, which must be transmitted to the bishop; or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial. 1 Haw. 139.

Drawing a
weapon.

6 *If any shall maliciously strike another with any weapon, in any church or church-yard, or shall there draw any weapon with intent to strike, and shall be convicted thereof by verdict of 12 men, or confession, or by two witnesses, before the judges of assize, or justices of the peace in their sessions, he shall be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with an hot iron having the letter F, whereby he may be known and taken for a fray maker and fighter; and he shall also stand ipso facto excommunicate.* Eng. ft. 5 & 6 Ed. 6. c. 4. f. 3.

7. He who steals goods belonging to a parish church, may be indicted for stealing the goods of the parishioners. 1 Haw. 94.

For other matters, see title **Churchwardens**.

Churchwardens.

- I. *Who are exempted from being churchwardens.*
- II. *Choosing and swearing of churchwardens.*
- III. *Their duty in levying rates.*
- IV. *Their duty as to repairs; and therein concerning church seats.*
- V. *Their duty as to sundry other matters.*
- VI. *Concerning presentments;*
- VII. *Their accounting.*
- VIII. *Their punishment on misbehaviour.*
- IX. *Their indemnity on doing their duty.*

I. *Who*

I. Who are exempted from being churchwardens.

1. **A** Counsellor, or attorney, ought not to be chosen churchwarden; and if he is, he may have a prohibition, by reason of his attendance on the courts at ———. *2 Roll's Abr. 272.*
2. Dissenting teachers or preachers, in holy orders, or pretended holy orders, being duly qualified, are exempted from the office of churchwarden. *1 W. sess. 1. c. 18.* Dissenting ministers.
3. Other dissenters, scrupling to take upon them the office, may execute the same by a sufficient deputy, to be approved of in like manner as other churchwardens. *1 W. sess. 1. c. 18.* Other dissenters.

II. Choosing and swearing churchwardens.

1. Churchwarden shall be chosen yearly in *Easter* week, by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, the minister shall chuse one, and the parishioners another. *Can. 89.* When to be chosen, and by whom.
- But where there is a custom for the parishioners to chuse both, that custom shall continue. *Gibf. Codex. 242.*
2. A person chosen churchwarden, refusing to take his office and oath, may be excommunicated for the refusal; and no prohibition will lie. *Gibf. 243.* Refusing to take the office.
3. And the ecclesiastical judge, refusing to swear him, may be compelled by a mandamus. *Gibf. 243.* Refusing to swear them.
4. The churchwardens oath, as said to have been agreed on, upon mutual consultation between the civilians and common lawyers, is as follows: Churchwardens oath.

“ You shall swear truly and faithfully to execute the office of a churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm: So help you God and the contents of this book.” *Gibf. 243.*

5. Churchwardens being thus sworn, are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them; and also to purchase goods for the use of the parish; but they are not a corporation in such sort as to purchase lands, or take by grant, except in London by custom. *Gibf. 241.* Churchwardens a body corporate.
6. Churchwardens shall continue in office, till the new churchwardens be sworn. *Can. 89.* How long they shall continue.

III. Their duty in levying rates; and therein of vestries.

1. The rates must be made with the consent of the major part of the parishioners, housekeepers, or occupiers of land. In order to which, publick notice of a vestry (a place so called from the vestments of the minister kept Summoning a vestry.

Churchwardens.

kept there) ought to be given the Sunday before, either in the church after divine service is ended, or else at the church door as the parishioners come out; both of the calling of the said meeting, and also of the time and place of the assembling of it. And it will be fairest then also to declare for what business the said meeting is to be held, that no one may be surprized, but that all may have full time before, to consider of what is to be proposed at the said meeting. And it is usual that for half an hour before it begins, one of the church bells be tolled to give the parishioners notice when they are met. *5 Co. 67. Par. L. 54.*

Who shall have a vote in the vestry.

2. At the common law, every parishioner who paid to the church rates, and no other, had a right to vote. *Par. L. 56.* And those that pay no church rates shall have no vote in affairs relating to it, except it be the rector or vicar. *Wood b. 1. c. 7.*

Papists disqualified.

12 Geo. 1. c. 9. sect. 7. For preventing of papists having it in their power to obstruct the rebuilding and repairing churches for divine worship, no inhabitant of any parish being a papist, shall be capable of giving their vote at any vestry to be held for the purposes aforesaid.

Who may adjourn the vestry.

3. All persons who have a vote in the vestry have an equal right, and neither the minister nor churchwardens, without a special custom, can adjourn the vestry; but this can only be done by a majority of the whole assembly. *Str. 1047.*

Laying the rates.

4. When the churchwardens and parishioners are there met, they are to consider what sum of money it will be necessary to raise for such repairs as shall then be needful; and after they have agreed what sum is fit, they are to make an equal levy. *Degge 171.*

Majority to bind the parish.

5. And the major part of them that appear, shall bind the parish; or if none appear, the churchwardens alone may make the rate; because they, and not the parishioners, are to be cited and punished, in defect of repairs. *Gibbs. 220.*

Entering in a book.

6. It is most convenient, that every parish act there be entered in the parish book of accounts, and every man's hand consenting to it be set thereto; for then it will be a certain rule for the churchwardens to go by. *Par. L. 55.*

Select vestry.

7. By custom there may be select vestries, of a certain number of persons elected yearly, to make rates, and manage the concerns of the parish for that year: and such custom is a good custom. *Read. Ch. Service. Gibbs. 246. Str. 728.*

Two rates, one for the fabrick, another for ornaments. Occupiers of land,

8. It is holden, that a rate for the reparation of the fabrick of a church is real, charging the land, and not the person; but a rate for ornaments is personal, upon the goods, and not upon the land. *Gibbs. 220.*

And in *Jeffrey's case*, *5 Co. 67.* it was solemnly adjudged, that the rates for the repair of the church shall be laid upon every occupier of lands in the parish, altho' such occupier live in another parish; and such person may come to the vestries of the parishioners, and vote in the making a rate: but he shall not be charged towards the ornaments of the church, as for bells, repair of seats, bread and wine, clerk's wages, visitation charges, and the like, by reason of such lands; for that the personal estates of the inhabitants are chargeable with every thing that doth not relate to the fabrick of the

the church, or repairs of the fences of the churchyard, or such other things as concern the freehold.

And therefore some have been of opinion, that churchwardens should make two rates; one upon lands and houses, which may concern the freehold of the church, and another upon personal estates and stock, to defray other expences. But as this method creates confusion, so it is seldom practised.

And Sir *Simon Degge* says, that he conceives the law to be clear otherwise; and that a foreigner who holds lands in the parish is as much obliged to pay towards the bells, seats, and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, which he never observed to be practised within his knowledge. But he leaves it a query, among a diversity of opinions. *p. 173.*

And Mr. *Shaw*, in his parish law, having cited the authors who hold these different opinions, says, that the practice generally now goes according to the opinion last mentioned, namely, that foreigners occupying lands within the parish shall be charged to both; and that the ecclesiastical judges, as well as the temporal, for the ease and convenience which accrues from the making of one levy for all, do give countenance hereto, and begin to treat the contrary opinion as obsolete and out of doors. *p. 92.*

9. A taxation by the pound rent is the most equitable way, and not according to the quantity of the land. *Wood b. 1. c. 7.* Equal pound rate.

10. Where lands are in farm, not the lessor, but the tenant, shall be rated and pay. *Gibf. 221.* Tenant to be charged.

11. An impropriator, tho' bound to repair the chancel, is also bound to contribute to the reparations of the church, if he hath lands in the parish, which are not parcel of the parsonage. *Gibf. 221, 223.* Impropriator, how far chargeable.

12. If any person find himself aggrieved at the inequality of the assessment, his appeal must be to the ecclesiastical judge. *Degge 172.* Appeal against the rates.

And in such case, if he will be relieved, he must shew, that he is illegally or unequally taxed in respect of the quantity of his land, as being rated for more than he has, or that the land which he hath is over rated, or that the rate was needless, or that some lands in the parish are omitted in the rate. *Wood b. 1. c. 7.*

(1) But by the act, 3 *Geo. 2. c. 11.* Every parish cess made at any vestry for the repair of the parish-church or chapel, or other necessary charges belonging to such church or chapel, shall in ten days after the same is so agreed upon be equally applotted upon the inhabitants, by the churchwardens or other persons appointed for that purpose by the major part of the protestant parishioners in vestry assembled. *Seet. 3.* Applotting cess.

(2) Which applotment shall be returned to the minister of the parish, who the first *Sunday* after he hath received the same, shall after divine service in the morning give publick notice thereof, as also of a vestry to be held in ten days after such notice, in order to have the said applotment examined into, at which vestry the major part of the protestant inhabitants there assembled shall have power to hear all parties who shall object to the said applotment, and to make such alterations as to them shall seem reasonable, and finally to ascertain the same. *Ibid.* Notice of a vestry.

(3) And

Transcripts to be made.

(3) And after the same is so ascertained they shall cause two distinct transcripts thereof to be made, each to be subscribed by the minister, churchwardens and three of the protestant parishioners then present, one part whereof shall remain with the minister and parishioners, and the other shall be delivered to the churchwardens, who shall with all convenient expedition proceed to collect and levy the same, to be applied to the uses for which it was ordered. *Ibid.*

Rate how to be recovered.

If any refuse to pay the rates, being demanded by the churchwardens, they are to be sued for in the ecclesiastical courts, and not elsewhere. *Gibbs. 219. Degge 171.*

Warrant to levy cesses.

4. But by the 12 Geo. 1. c. 9. Such money as shall be assessed and ordered at vestries for building and repairing of churches, shall be levied by warrant under the hands and seals of two justices of the peace of the county where such parish doth lie, by the churchwardens, by distress and sale of the goods of the persons refusing or neglecting to pay the sums apploited on them pursuant to such act of vestry, together with the charges of such distress and sale, returning the overplus if any. *f. 8.*

Appeal to the sessions.

(5) And in case any persons shall think themselves aggrieved by such applotment or the levying thereof, they shall be at liberty to appeal to the next quarter-sessions held for the said county, who are finally to determine the same. *Ibid.*

IV. Their duty as to repairs; and therein concerning church seats.

Who shall repair.

1. Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the parishioners; and the disposing of the seats therein, the right of the ordinary. *Gibbs. 221.*

Who may compel the repairs to be made.

2. The spiritual court may compel the parishioners to repair the body of the church, and may excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved, till the greater part agree to a tax. *Read. Ch. Service.*

Difference between adding something new, and repairing the old.

3. If the churchwardens erect or add any thing new, either to the fabric of the church, utensils, or church yard, they must have the consent of the parishioners; and if such additions are in the church, the bishop's licence is also necessary. But where necessary repairs are wanting, the greater part of the parish will bind the less; and if the major part will not consent, where repairs are necessary, the churchwardens may repair without their consent, if upon notice given they refuse to meet, or when they are met, refuse to make a rate. But if a church fall down, the parishioners are not bound to rebuild it. *Read. Ch. Service. 1 Vent. 367.*

Majority may rebuild.

4. But if a church be so much out of repair, that it is necessary to pull it down, or so little, that it needs to be enlarged, the major part of the parishioners may make a rate for new building, or enlarging, as there shall be occasion. This was declared in the 29 C. 2. by all the three courts successively; notwithstanding the cause was laboured by a great number of quakers, who opposed the rate. *Gibbs. 221.*

5. The parson, that is, the spiritual rector, or also the lay impropriator, ^{Repairing the} are bound by common right to repair the chancel, and is thereupon intitled to the chief seat therein, unless another hath it by prescription; yet he hath not the disposal of the seats therein, but the bishop.

Gibf. 223, 224.

6. An isle in a church, which hath time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, ^{Repairing an} isle. is part of his frank tenement, and the ordinary cannot dispose of it, or intermeddle in it. *Gibf.* 221.

7. A seat, or priority in a seat, in the body of the church, may be prescribed for as belonging to a house, if it hath been used, and also repaired, ^{Seat insepara-} time out of mind, by the inhabitants of such house. *Gibf.* 221. ^{ble from the} house.

And no one can claim a seat in a church by prescription, as appendant or belonging to land, but it must be laid as belonging to a house, in respect of the inhabitancy thereof. *Wood b.* 1. c. 7.

And therefore a seat may not be granted to a person and his heirs absolutely; for the seat doth not belong to the person, but to the inhabitant. *Gibf.* 221.

V. Their duty as to sundry other matters.

1. They are to see that the church ways be well kept and repaired. And ^{Church way.} the right to a church way may be claimed and maintained by a libel in the spiritual court. 2 *Roll's Abr.* 287.

2. Churchwardens have the care of a benefice during its vacancy: ^{Vacancy.} having first taken out a sequestration from the spiritual court, they are to manage all the profits and expences of the benefice for him that shall next succeed; plow and sow his glebe; take in the crop; collect tithes; thrash out and sell corn; repair houses and fences, and the like. And they shall take care that during the vacancy the church shall be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. And if the successor thinks himself aggrieved by them, he may appeal to the ecclesiastical judge. *Par. L.* 99. *Comp. Par. Off.* 90.

3. They (or the constable) shall levy the penalties for persons exercising ^{Worldly call-} their worldly calling on the Lord's day. 7 *W.* 3. c. 17. ^{ing on the} Lord's day.

4. They shall suffer no plays, feasts, banquets, suppers, church ales, ^{Profanation of} drinkings, temporal courts or leets, lay juries, musters, or any profane the church. usage to be kept in the church or church yard. *Can.* 92.

5. They shall see that the parishioners resort to church, and continue ^{Attending di-} there orderly, during divine service; and shall present the defaulters. ^{vine service.} *Can.* 88.

6. They shall not suffer any idle persons to abide either in the church- ^{Loitering in the} yard, or church-porch, during the time of divine service or preaching; but church yard. shall cause them to come in, or to depart. *Can.* 88.

7. They shall levy the forfeiture of 12 d. a Sunday, on the goods of per- ^{Levying 12 d.} sons not coming to church. 2 *Eliz.* c. 2. ^{a Sunday, &c.}

8. They (or the constable) shall levy the penalty of 3 s. 4 d. for using ^{Sports on the} unlawful pastimes on the Lord's day. *En. ft.* 1 *Car* 1 c. 1. ^{Lord's day.}

T

9. They

Excommuni-
cate persons.
Ornaments of
the church.

9. They shall keep excommunicated persons out of the church. *Can. 88.*

10. They shall take care to have in the church a large bible, book of common prayer, book of homilies, a font of stone, a decent communion table, with proper coverings, the ten commandments set up at the east end, and other chosen sentences upon the walls, a reading desk, and pulpit, and chest for alms; all at the charge of the parish. *Can. 94, 95, 96.*

Keys of the
belfrey.

11. They ought to keep the keys of the belfrey, and to take care that the bells be not rung without good cause, to be allowed by the minister and themselves. *Can. 92.*

VI. Of presentments; and therein concerning sidesmen or assistants.

Oath to pre-
sent.

1. Churchwardens by their oath are to present or certify to the bishop, or his officer, all things presentable by the ecclesiastical laws, which relate to the church, minister and parishioners.

Book of ar-
ticles.

2. The articles delivered to them for their direction, are for the most part founded on the book of canons made in the year 1603, and the rubricks of the common prayer.

When to pre-
sent.

4. They may present as often as they please, but shall not be obliged above once a year where it hath so been used, and not above twice any where, except it be at the bishop's visitation *Can. 66, 67.*

Fee for taking
in present-
ments.
Minister may
present.

5. For the presentments of any church or chapel for one year, the register shall have only 4 *d.* *Can. 66.*

6. The minister may present where the churchwardens neglect. *Can. 64.* But such presentment ought to be upon oath. *2 Vent. 42.*

Sidesmen.

7. In larger parishes, there are officers called sidesmen (antiently synodsmen, otherwise called questmen) to assist the churchwardens in their enquiries and presentment of offenders: They shall be chosen yearly in *Easter* week by the minister and parishioners, if they shall agree; if not, by the bishop. *Can. 88.*

Sidesman's
oath.

8. The sidesman's oath, said to have been agreed on by the civilians and common lawyers, is this:

"You shall swear, that you will be assistant to the churchwardens in the execution of their office, so far as by law you are bound: So help you God." *Gibf. 242.*

Presentment on
common fame.

9. Whereas churchwardens are sworn, and ministers charged, to present as well crimes and disorders, as also the common fame which is spread abroad of them, whereby they are sometimes troubled by the delinquents or their friends; all judges both ecclesiastical and temporal are (by the 65th canon) admonished and exhorted, as they regard and reverence the fearful judgment seat of the highest judge, that they admit not in any of their courts any suit against churchwardens or ministers for any such presentments; considering that they tend to the restraint of shameless impiety, and that the rules of charity and government do presume they did nothing therein of malice, but for the discharge of their consciences.

But

But as common fame is often false, and as it is better that ten offenders should escape than one innocent person suffer, and as the above canon supposes that an action may be brought for such presentment; it seemeth good to use caution in this matter, unless the offence be very notorious.

10. But by 6 *Geo. 1. c. 6.* All persons who by law are required to make presentments unto any ecclesiastical judge, shall before such presentment be received and citation thereon granted upon oath be interrogated and examined, or produce some credible witness to be interrogated and examined by the ecclesiastical judge unto whom such presentment is made, which examination such judge is to cause to be reduced into writing and to attest, as also to lodge in the registry and to annex the same unto the depositions in manner above mentioned. *Sett. 11.* Affidavit before a citation issues.

VII. Their accounting.

1. At the end of the year, or within a month after at most, they shall before the minister and parishioners (at a vestry) give up a just account of such money as they have received, and also what particularly they have bestowed in reparations, and otherwise, for the use of the church; and shall deliver up to the parishioners the money and parish goods in their hands, to be delivered over by them to the next churchwardens by bill indented. *Can. 89.* When to account.

2. And if they refuse, they may be presented at the next visitation by the new churchwardens; or any of the parish that are interested may by process call them to account before the ordinary; or the succeeding churchwardens may have a writ of account at common law. And if they have disbursed more than they have received, the succeeding churchwardens shall pay what is due to them, and account it among their disbursements. *1 Roll's Abr. 121.* How compelled to account.

(1) And by the 3 *Geo. 2. c. 11.* If any churchwardens shall wilfully neglect or refuse to collect any parish tax or cess so applotted and ascertained as aforesaid, or at the expiration of their office shall refuse or neglect to account for the same in any vestry to be held for that purpose, of which ten days notice shall be given in such church or chapel immediately after divine service in the morning, it shall be lawful for the succeeding churchwardens to sue for and recover from the said churchwardens the sums in the said applotment contained. *Sett. 3.* Neglecting to account.

(2) Or if after an account stated in manner aforesaid, any such churchwarden shall after a demand made, refuse or neglect to pay the balance of such account remaining in their hands to the succeeding churchwardens, it shall be lawful for the succeeding churchwardens to sue for and recover from the said churchwardens such respective sums, in cases where the same does not exceed twenty pounds, by civil bill at the general assizes to be held for the county where such parish-church or chapel is, or where such parish-church or chapel is within the city or county of *Dublin* at the general quarter-sessions to be held for the said city or county; and in cases where any such sum exceeds twenty pounds, the same to be sued for and recovered by action of debt, &c. in any of his Majesty's *Four-courts of Dublin.* Refusing to pay the balance.

Applotment
shall be evi-
dence.

(3) And in such suit or action, the afore mentioned applotment subscribed by the minister, churchwardens, and three parishioners, shall be sufficient evidence to charge the defendants with the several sums contained in the said applotment, and the account stated as afore said shall be admitted as sufficient evidence to charge the defendants with the balance of such account. *s. 4.*

Allowances to
be made.

(4) Provided that if any such churchwardens refusing to account as afore said shall after judgment obtained against them, and payment made as afore said, apply to the minister and succeeding churchwardens to be admitted to account, the minister, churchwardens, and parishioners in vestry assembled shall take such account, and such succeeding churchwardens shall pay back all such sums as the churchwardens so accounting shall prove to have been applied to the use of the parish, and also such sums as they can make appear upon oath could not be collected, by reason of the poverty or other circumstances of the parties upon whom they were applotted, which oath any justice of the peace for the city or county, or county of the city where such parish church or chapel lies, are required to administer. *s. 5.*

Appeal to the
sessions.

(5) And if the churchwardens so accounting shall find themselves aggrieved by the determination of the said minister, succeeding churchwardens, and parishioners upon taking such account, they may appeal to the justices at the next general-quarter-sessions for the county where such parish-church or chapel is, who are empowered to summon and examine witnesses upon oath and finally to determine the same.

Repayment.

(6) And in case they shall adjudge any sum to be repaid by the succeeding churchwardens to the churchwardens so accounting, to cause the same to be levied by distress and sale of the goods of such succeeding churchwardens or any of them, by warrant under the hands and seals of any two of the justices present at the said sessions.

Costs of appeal.

(7) And in case they shall confirm the determination of the minister, succeeding churchwardens, and parishioners, they shall award such costs as they shall think reasonable not exceeding forty shillings, to be levied by distress and sale of the goods of the persons so appealing by warrant under the hand and seal of two of the justices present at the said sessions.

Accounting to
a select vestry.

3. If the custom of the parish is, for a certain number of persons to have the government thereof, and the account is given up to them; the custom is a good custom, and the account given to them a good account. *Gibbs. 242.*

Vouchers.

4. Mr. *Barlow* says, that for disbursements of any sum not above 40 s. their own oath is held sufficient proof; but for all sums above, receipts must be produced. *Barl. 105.* But it may be more satisfactory if receipts be produced for all.

Allowance of
the account.

5. The allowance of the account may be by entring it in the church book of accounts, and having it signed by those in the vestry who allow the accounts. *Barl. 105.*

Account allow-
ed final.

6. When they have faithfully accounted, and their account, is allowed by the minister and major part of the parishioners present, it shall not afterwards be in the power of any to make them account again; unless some fraud in their account is afterwards discovered. *Wood b. 1. c. 7.*

E. 7 G. 2. Wainwright and Bagshaw. The churchwardens were cited into the court of *Litchfield* to account. They pleaded, that they had accounted at the vestry according to law. Which plea was rejected; and thereupon a prohibition was granted: for the ordinary is not to take the account, he can only give a judgment that they do account; and to what purpose should they be sent back, to those who have taken their accounts already. *Str. 974, 1133.*

VIII. Their punishment on misbehaviour.

1. If the church wardens waste the goods of the church, the new churchwardens may call them to an account before the bishop, or bring their action at common law. *Read. Ch. Service.* Churchwardens committing waste.
3. But churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful. *Wood b. 1. c. 7.* Not answerable for indiscretion.

IX. Their indemnity on doing their duty.

If any action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence; and if a verdict is given for them, or the plaintiff shall be nonsuit, or discontinue, they shall have double costs. *10 Car. 1. sess. 2. c. 16.* Double costs.

In *Kercheval's case*, *M. 8 Car.* An action was brought against the churchwardens for a presentment upon common fame of incontinency. Upon not guilty, it was found for the churchwardens, and moved that they might have double costs: but it was resolved, that this being merely ecclesiastical, is not within this statute; for that the statute was never intended, but where they shall be vexed concerning temporal matters, which they shall do by virtue of their office, and not for presentments concerning matters of fame. *Cro. Car. 285, 286.* Action for presentment.

5. They shall have a box, wherein to keep the register, with three locks and keys, two keys to be kept by them, and one by the minister; and every Sunday they shall see that the minister enter therein all christnings, weddings, and burials that have been the week before; and at the bottom of every page, they shall (with the minister) subscribe their names. And they shall, within a month after *March 25.* yearly, transmit to the bishop a copy thereof for the year before, subscribed as above. *Can. 46.* Register how to be kept.

And such register, being carefully preserved, is good evidence; and the falsifying of it is punishable at the common law. *Gibf. 229.* Evidence.

16. They shall, at the charge of the parish, with the advice and direction of the minister, provide bread and wine against the communion. *Can. 95.* Bread and wine for communion.

17. They, (or the overseers) shall levy the penalty of 5*l.* for an incumbent not reading the common prayer once a month. *17 & 18 Car. 2. c. 6.*

19. They

Churchwardens.

Strangers
preaching.

19. They shall not suffer any strangers to preach, but such as shall appear qualified on shewing their licence; and they shall see that such preachers register or subscribe their names in a book to be kept for that purpose, with the day when they preached, and the bishop's name who granted the licence.

Can. 39.

Persons denied
christian burial.

21. Persons who murder themselves, or die excommunicated, are denied christian burial; and therefore the church-wardens are not to suffer them to be buried in the church or church-yard, without special licence from the bishop. *Degge 183.*

Servants firing
houses.

35. They shall receive the penalty for servants carelessly firing houses. *2 Geo. 1. cap. 5.*

Tracing hares.

36. They shall receive the penalties for tracing hares in the snow (and other game penalties). *10 Will. 3. cap. 8.*

Surveyors of
the highways.

37. They shall join with the constable and surveyor of the high-ways in chusing and returning new surveyors. *11 Jac. 1. cap. 7.*

Clergy.

I. Clergymen.

II. Benefit of clergy.

I. Clergymen.

Liabie to the
highways.

1. **A**ND Mr. *Hawkins* says, clergymen are within the purview of the statutes relating to the repair of highways, in respect of their spiritual possessions, as much as any other persons whatsoever in respect of any other possessions; for the words are general, and there is no kind of intimation in the said statutes, that any particular persons shall be exempted more than others. *1 Haw. 204.*

And to other
publick char-
ges.

2. And it seems to be now generally settled, that clergymen are liable to all publick charges imposed by act of parliament, where they are not specially excepted.

May be impris-
oned for in-
continency.

3. The ordinary may punish clergymen for incontinency, by committing them to ward or prison by his discretion. *1 H. 7. c. 4.*

Privilege a-
gainst an assault.

4. A person, laying violent hands on a clergyman, may be punished in the ecclesiastical court. *En. st. 13 Ed. 1. Circumspecte agatis. En. st. 9 Ed. 3. st. 1. c. 3. 2 Inst. 492.*

May have the
benefit of
clergy.

5. Clergymen in holy orders may have the benefit of clergy a second, or third time, or oftner. *2 H. H. 374, 375.*

Shall not be
burnt in the
hand.

6. A clerk in holy orders shall not be burned in the hand, but shall have the same privilege as if he had been burned in the hand; and therefore shall not be drawn in question in the ecclesiastical court to deprive him, or inflict any ecclesiastical censure upon him. *2 H. H. 389.*

Shall not serve
temporal
offices.

7. To the intent that clergymen may the better discharge their duty in celebration of divine service, and not be intangled with temporal business; if any of them be chosen to any temporal office, he may have his writ to be discharged. *1 Inst. 96.*

8. Ecclesiastical persons have this privilege, that they ought not in person to serve in war. *2 Inst. 4.* Shall not serve in war.

9. Ecclesiastical persons are not bound to appear at the torn, or view of frankpledge. *En. ft. 52 H. 3. c. 10. En. ft. 9 Ed. 2. c. 3. 2 Inst. 4.* Need not appear at the torn.

10. No clergyman shall be arrested in any church or church-yard, whilst he attends to divine service, on pain of imprisonment of the offender, and ransom at the king's will, and gree to the party arrested. *En. ft. 50 Ed. 3. c. 5. En. ft. 1 R. 2. c. 15.* Shall not be arrested in the church.

But the arrest notwithstanding (if not on a Sunday) is good in law. *Watson c. 34. p. 344.*

11. The body of a clergyman may not be taken by force of any process upon a statute staple, or statute merchant. *2 Inst. 4.* Shall not be taken on a statute staple.

12. If an action of trespass, debt, account, or other action wherein process of *capias* lies, be brought against a clerk in holy orders, and the sheriff return that he is a clergyman beneficed, having no lay fee in which he may be summoned, in this case the plaintiff cannot have a *capias* to arrest his body, but a writ to the bishop to compel him to appear. *2 Inst. 4. Degge 157.* Nor on a capias.

13. If a person be bound in recognizance in the chancery, or in any other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop to levy the same of his ecclesiastical goods. *2 Inst. 4.* Sheriff shall not levy on his ecclesiastical goods.

14. A clergyman shall be amerced only according to his lay tenement, and not after the quantity of his spiritual benefice. *Magn. Chart. c. 14. Gibf. 15.* Shall not be amerced of his spiritual goods.

15. Distresses shall not be taken by sheriffs, or other of the king's ministers, in the inheritance of the church wherewith it was anciently endowed; but otherwise it is of late purchase. *En. ft. 9 Ed. 2. c. 9. 2 Inst. 4. Gibf. 18.* Distress not to be made on his spiritual inheritance.

16. A clergyman is not bound to pay tolls or other like customs, for his ecclesiastical goods; and if he be molested therefore, he may have a writ for his discharge. *2 Inst. 4. Gibf. 21.* Shall not pay toll of his spiritual goods.

And this not only for all the goods and merchandizes of clergymen gotten upon their church livings, but also for all goods and merchandizes by them bought, to be spent upon their rectories and church livings. *Degge 153.*

17. Lord Coke, in his readings on the *Magna Charta*, says thus, "True Observation
" it is, that ecclesiastical persons have more and greater liberties than other
" of the king's subjects, wherein to set down all would take up a whole
" volume of itself, and to set down no example agreeth not with the office
" of an expositor; therefore some few examples shall be expressed, and the
" studious reader left to observe the rest as he shall read them in our books,
" and other authorities of law." And the instances he gives, are chiefly those which are mentioned above; nevertheless I do not find any author since his time, who hath said what are those other many and great privileges of the clergy; but the authors do generally adhere to these particular instances, probably as being supported by so great an authority: Other privileges have been abolished since his time by acts of parliament, and the adjudications of

Clergy.

of the temporal courts, and others perhaps lost by disuse; and possibly some of the instances above-mentioned would have been gone likewise, or not looked upon as of so much authority, if they had not been vouched by Lord Coke.

II. Benefit of clergy.

- I. Original of the benefit of clergy.*
- II. By what persons it may be demanded.*
- III. In what cases it may be demanded.*
- IV. At what time it must be demanded.*
- V. Effect of clergy allowed.*

I. Original of the benefit of clergy.

Original of the
benefit of
clergy.

ANciently princes and states, converted to Christianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions; and particularly, an exemption of their persons from criminal proceedings, in some capital cases before secular judges; which was the true original of the benefit of clergy.

The clergy increasing in wealth, power, honour, number, and interest, afterwards set up for themselves; and that which they obtained by the favour of princes and states at first, they now began to claim as their right, and a right of the highest nature, namely, by the law of God; and by their canons and constitutions endeavoured, and in some places obtained, vast extensions of these exemptions, both with regard to the persons concerned, to wit, not only to persons in holy orders, but also to all that had any kind of subordinate ministration relative to the church; and likewise in respect of the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from Christ, and from the pope shed abroad into all subordinate ecclesiastical jurisdictions.

And by this means they endeavoured, and in some kingdoms and for some ages obtained, that there was a double supreme power in every kingdom; the one ecclesiastical, absolute, and independent upon any but the pope, over ecclesiastical men and causes; and the other secular, of the king or civil magistrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew so burdensome, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom: for ecclesiastical canons never bound in *England*, farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and

and customs of the kingdom that admitted them, and only so far forth as they were so admitted.

And therefore if they were indicted in cases criminal, but not capital, nor wherein they were to lose life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of trespass or petit larceny.

Also it was not allowed them in high treason.

But, at the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, *insidiatores viarum*, & *arson*. 2 H. H. 323, 330.

II. By what persons it may be demanded.

Who may demand it.

1. By a favourable interpretation of the statutes relating to the benefit of clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verse) have been taken to have a right to this privilege, as much as persons in holy orders. 2 Haw. 338. Others besides clergymen.

2. But by the common law, a woman could not have the benefit of clergy: but now by the stat. 9 Will. 3. cap. 32. a woman convicted or outlawed for any felony, for which a man might have his clergy, shall upon praying the benefit of that statute, be subject only to such punishment as a man would be in the like case. Women.

3. Lord Hale says, A person convicted of heresy, a Jew, or a Turk, shall not have their clergy; but a person excommunicate shall have his clergy. 2 H. H. 373. Hereticks, Jews, Turks, persons excommunicate.

But by 9 Ann. cap. 6. which abolished the ceremony of reading, the wall of partition (as Sir Michael Foster expresses it) between subject and subject under one and the same degree of guilt, is taken away; which measure intitled to the indulgence of the law, in common with the rest of their fellow subjects, all those who before were supposed to be under a legal incapacity for orders, as Jews and some others were, and likewise those who in presumption of law were not qualified in point of learning, of which reading a scrap of Latin (*viz. miserere mei deus*) which they called the *neck-verse*, was commonly made the test. And from this period, the measure of punishment hath been governed by the degrees of real guilt, and not by the function or abilities of the offender. Fost. 305, 6.

4. By the 4 H. 7. c. 13. Every person (not being within orders) who hath been once admitted to his clergy, shall not be admitted to the same a second time. Persons having had clergy once.

5. And if he is convicted of murder, he shall be marked (unless he is a peer, 2 H. H. 376) with an M. on the brawn of the left thumb; and if for any other felony, with a T. 4 H. 7. c. 13. Burning in the hand.

6. But he shall not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof (according to the following statutes). 2 H. H. 373. Burning not a conclusive proof of the conviction.

And therefore the burning in the hand seemeth now to be of little use, and (as Sir Michael Foster observes) can scarcely be called even so much as a slight punishment, but rather a piece of absurd pageantry, tending neither

Conviction
how to be
certified.

to the reformation of the offender, nor for example to others; to wit, burning the offender in the hand with an iron scarcely heated. *Fost. 372.*

7. By 7 *Will. 3. cap. 32. s. 7.* The clerk of the crown, or of the peace, or of assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of assize, or justices of the peace write to him for the names of such persons, shall certify the same with the causes of the conviction or attainder.

How it may be
otherwise
certified.

8. Another method is given by the 9 *An. c. 6.* which enacts, that the clerk of the crown, clerk of the peace, or clerk of assize, where a person admitted to clergy shall be convicted, shall at the request of the prosecutor, or any other on the king's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence. *s. 5.*

How tried
whether he is
the same
person.

9. Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of clergy. 2 *H. H. 373.*

III. In what cases it may be demanded.

Formerly al-
lowed in all
felonies.

1. By the 25 *Ed. 3. st. 3. c. 4.* All manner of clerks, who shall be convicted before the secular judges, for any treasons or felonies, touching other persons than the king himself, shall have the privilege of holy church.

But not in
treason or petit
larceny.

2. Clergy was never allowed in this nation, in cases of high treason, nor is it allowed on indictments of petit larceny or trespass; but by the above recited act, clergy was allowed in all treasons and felonies, except treason against the king: So that after this statute, the benefit of clergy might be pleaded and allowed in all other treasons and felonies. *Hale's Pl. 230. 2 H. H. 326.*

Clergy taken
away by
statutes.

3. Consequently, wherever clergy is not allowable in any other cases, it is taken away by some subsequent act of parliament. *Hale's Pl. 230.*

Allowed in
new felonies,
unless expressly
taken away.

4. Consequently, where a new felony is made by an act of parliament, clergy is to be allowed, unless expressly taken away by such statute. *Hale's Pl. 230.*

And if it maketh a new felony, and takes away clergy not generally, but in such or such cases, regularly in other cases, clergy is allowable; as if it take away clergy in case the party be convicted by verdict, yet he shall have his clergy, if he stand mute. 2 *H. H. 335.*

But this is in part remedied by 9 *Will. cap. 32.* which enacts, that if any person be indicted of any offence, for which by virtue of any former statute he is excluded from clergy, if he had been convicted by verdict or confession; if he stand mute, or will not answer directly, or challenge peremptorily above 20 of the jury, or be outlawed, he shall not be admitted to his clergy. *s. 2.* But this extends not to appeals, nor to offences made felonies by subsequent statutes. 2 *Haw. 348.*

But

But if the statute enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents. 2 H. H. 336.

5. It follows further, from what hath been said, that in all cases where an act of parliament ousteth clergy, in case of any felony, the indictment must precisely bring the party within the case of the statute; otherwise, altho' possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alleged in the indictment, the party, tho' convict, shall have his clergy. 2 H. H. 336.

Therefore where clergy is excluded, the indictment must bring the offence within the statute.

But altho' the case be so laid in the indictment, that it comes within the statute, to exempt the prisoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not so qualified as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the matter laid in the indictment, and thereupon the prisoner shall be admitted to his clergy; and this is commonly done. 2 H. H. 336.

6. But if the offence was capital at the common law, and a statute only excludes it from clergy; the indictment in such case need not conclude *against the form of the statute*, because the statute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a personal privilege of exemption from such judgment. 2 Harw. 342.

Indictment on a statute which ousteth of clergy an offence which was felony at common law.

7. Furthermore, from what hath been observed above, it follows, that where an act taketh away clergy from the principal, and saith nothing of the accessary; the accessaries as well before, as after, shall have their clergy.

Accessary.

11 Co. 37. Fost. 355.

IV. At what time it must be demanded.

1. By the ancient common law, the benefit of clergy was demanded as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; but this was found a great inconvenience to the prisoner, because possibly he might have been acquitted of the felony; or if not, yet in case of an inquest of office, he lost his challenges to such inquest, and yet upon such inquest found, he forfeited his goods, and the profits of his lands; and therefore *Prisot* Ch. J. with the advice of the other judges, in the reign of H. 6. for the safety of the innocent, would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof: which course hath been generally observed ever since. 2 Inst. 164. 2 H. H. 378.

To be demanded after conviction.

2. And this benefit of clergy may be allowed by the court in discretion, tho' the party challenge it not. *Hale's Pl.* 239.

May be allowed tho' not demanded.

V. Effect of clergy allowed.

1. Persons admitted to their clergy, may be continued in prison as a further punishment, not exceeding one year. 11 Jac. 1 cap. 3.

May be continued in gaol.

2. And by 6 Geo. 1. cap. 12. Persons convicted of offences within benefit of clergy (except receivers and buyers of stolen goods) may, instead of being whipped and burnt in the hand, be transported for seven years.

May be transported.

Shall forfeit
their goods.

But not lands.

Credit restored.

Actionable to
call him felon.

3. A person admitted to his clergy, forfeits all his goods that he hath at the time of the conviction. 2 H. H. 388.

4. But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 H. H. 388.

5. Also, it restores him to his credit; and consequently enables him to be a good witness. 2 Haw. 364.

6. And it is holden that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 Haw. 365.

Clerk of the Peace.

By whom to be
appointed.

Oaths to be
taken.

Fees may be
taken.

1. **T**HE *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of clerk of the peace, by himself or his sufficient deputy, to be allowed of by the said *custos rotulorum*. En. st. 37 H. 8. c. 1.

2. He shall moreover take the oaths of allegiance, supremacy, and abjuration, and perform the other requisites, as other persons who qualify for offices.

3. The clerk of the peace is not bound to enter judgment, or the like, at the suit of any, without having the fee due for the same; but if the court order any thing without suit of another, to wit, *ex officio*, there he ought to enter the same without having any fee for the entering thereof. Crom. 159.

Also Mr. *Crompton* says, he shall have for every recognizance of the peace taken in court 2s. and for every release of the peace there 2s. and for process awarded against any to find surety of the peace 2s. Crom. 160.

His duty in other matters is interspersed where it falls in amongst the other titles of this book.

Appointment of a Clerk of the Peace.

FOrasmuch as the office of clerk of the peace for the county of——— is now void, by the death of——— gentleman, late clerk of the peace for the said county; Know all men by these presents, that I——— *custos rotulorum* of the county aforesaid, do hereby nominate, elect, appoint and assign C. P. gentleman, an able and sufficient person, instructed and learned in the laws of England, and residing in the said county, to be clerk of the peace for the said county; to hold, execute, and enjoy the office of clerk of the peace for the county aforesaid by himself or his sufficient deputy; and to take and receive the fees, profits, and perquisites thereof, so long as he shall well, justly, and honestly demean himself in his said office. In witness whereof, I the said——— have bereunto set my hand and seal, the——— day of——— in the——— year———.

BY

BY the act of 25 *Geo. 2. cap. 10.* Every person, not being a coach-maker, who shall keep any coach, &c. chargeable with the duties by the 3 *Geo. 2. cap. 3.* shall within one calendar month after he or she shall have any such coach, &c. by writing under his or her hand, certify to the collector of the district where he or she shall reside, a true account of all such coaches, &c. which they shall keep, with the name of the place and parish of his or her usual residence. Return of Coaches.

And every person chargeable with the said duty, who shall neglect to make and return such certificate, the same being made appear by the oath of one witness before any justice of the peace of the county where the person making such default shall usually reside, shall forfeit five pounds, to be levied by distress and sale of the offenders goods, by warrant under the hand and seal of such justice, rendering the overplus, if any be, to the owner thereof, which forfeiture shall be wholly paid to the informer Penalty of neglect.

Coals and Coalpits.

1. **B**Y the act 1 *Geo. 2. cap. 21. sect. 1.* If any persons, bodies politick, or corporate, shall enter into any unlawful combination or agreement for enhancing the prices of coals, such persons being thereof convicted, on any information or indictment, shall, for every such offence, forfeit fifty pounds, to be recovered in *the King's Bench*, common-pleas, or exchequer, by information or action of debt. Combinations to enhance the price of coals.

One moiety of the forfeiture to go to the persons who shall sue for the same, and the other moiety thereof to the minister and churchwardens of the respective parishes, wherein such offence shall be committed, for the use of the poor of the said parish.

To be accounted for by such persons who shall recover the same, as money levied for the use of the poor of such parish or parishes are to be accounted for, in which information or action, no protection, essoin, or wager of law shall be allowed.

2. No persons retailing coals, shall keep for measuring any sort of coal, commonly called sea-coal, brought into any harbour or port of this kingdom, any half barrel, bushel, half bushel, peck, or half peck, but such as are of the following dimensions, and contain the following quantities, and shall be sealed by the clerks of the respective markets, *viz.* Measure of coals.

Every half barrel shall be twenty-four inches diameter in the bottom, and twenty-five inches and a half in the top at least, and contain twenty gallons *Winchester* measure.

Every bushel shall be twenty inches diameter in the bottom, and twenty-one inches in the top at least, and contain ten gallons of the like measure; every half bushel shall be fifteen inches diameter in the bottom, and sixteen inches in the top at least, and contain five gallons of the like measure.

Every peck shall be eleven inches diameter in the bottom, and twelve inches in the top at least, and contain two gallons and a half of the like measure; every half peck shall be ten inches and a half diameter in the bottom

Coals and Coalpits.

bottom and eleven inches and a half in the top at least, and contain one gallon and a quarter of the like measure.

Penalty for
selling by other
measure.

Upon pain of forfeiture of all the coals which shall be otherwise sold or exposed to sale by any retailer of coals, and also double the value thereof, to be recovered by any persons before the chief magistrate of such city or town corporate where such coals shall be imported, who are required to call the parties before them and to hear and examine such complaints upon oath, and upon due proof thereof made to their satisfaction, to convict the offenders, and to give warrant under their hands and seals for levying the forfeitures accordingly, the one moiety thereof to be to the use of the persons so prosecuting or complaining and the other moiety to the use of the poor of the parish where such offence shall be committed.

3 Provided that no suit shall be commenced for any forfeiture or penalty incurred by any offence contrary to this act, unless the same be commenced within six months next after such offence shall be committed.

Search warrant
for coals.

4. And by the 1 G. 2. c. 24. It shall be lawful for any persons having a warrant for that purpose under the hands and seals of any two justices of the peace, to search in all suspected places, for any ore, coals, mineral or timber, imbezelled. *f. 2.*

And if such persons shall find any such ore, coals, mineral or timber, to the value of five shillings, in the house or possession of any person being a day labourer or collier, or of any other person employed in the raising or working of such ore, coals, or minerals, they shall bring such persons in whose houses or possessions, such ore, coals, mineral, or timber, shall be found, before any two justices of the county where such ore, &c. shall be found.

And if such persons shall not make proof to the satisfaction of such justices, that such ore, &c. were honestly acquired by them, the persons in whose custody, such ore, coals, mineral, or timber, shall be found, shall stand convicted.

Committal and
whipping.

And the said justices shall commit such offenders to the house of correction, and shall order such offenders to be publicly whipt at the next market on the next market day after such conviction. *Ibid. f. 1*

And the constable of such market-town is required to execute such order, and to whip such offender severely on pain of twenty shillings, to be levied by order of the same justice by distress and sale of the goods of the said constable, to be paid to the churchwardens and applied to the poor of the parish where such market town is.

Second offence.

And if such persons shall again offend in the premises, and shall thereof be convicted as aforesaid, such persons shall be sent to the house of correction, and kept to hard labour for three months, and at the end thereof be also publicly whipt as aforesaid, or if such offenders will pay to the person injured treble the value of what shall be so embezelled, which treble value is to be ascertained by such justice before whom such persons shall be so convicted, the persons so offending and making such satisfaction shall be discharged from such corporal punishment.

Selling coals.

5. Also by the act, 29 Geo. 2. c. 12. No master, overseer, or collier, shall presume to sell or dispose of any quantity of coal, raised in the colliery he is employed to work in, for money, or any other consideration, unless such

Coals and Coalpits.

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such master, overseer, working or other collier, shall fairly and openly purchase the same from the owner and proprietor of such coal, or from the persons authorised by them to sell the same.

And if any master, overseer, working or other collier shall so dispose of or sell for money, or any other consideration, any quantity of coals so raised, (except as aforesaid) such master, overseer, working or other collier shall forfeit six pence for every hundred of coal he shall so dispose of as aforesaid, to the owner and proprietor of such colliery where the same was raised, together with the horse and carriage that shall be employed in carrying away or drawing the same. Forfeiture.

Provided such collier or other person employed in carrying away or drawing the same, be lawfully convicted thereof, by oath, before any one justice of the peace for the county where such offence is committed, or where such coal is seized or taken up.

And if any master, overseer, working, or other collier or miner, shall after the time aforesaid enter into any unlawful combinations, or shall refuse to work according to the articles entered into by them with the owners or proprietors of such collieries or mines, in such case, over and above the penalty provided by any former acts, such master, overseer, working or other collier or miner, shall forfeit all such money as shall be due to them by the owners of such collieries or mines at the time of their entering into such unlawful combination. Combinations not to work.
§. 10.

And shall also be committed to the common goal of the county where such offence is committed, there to remain for one calendar month without bail; provided such master, overseer, working or other collier or miner, be lawfully convicted of such offence, on oath, before one justice of the peace of the county where such offence is committed, or where such offender is found. Conviction.

This act is made perpetual by Stat. 1 Geo. 3. cap. 17. Sect. 18.

7. And moreover by the 1 Geo. 3. cap. 17. Every carman, and buyer of coals, at or in any colliery of this kingdom, shall, at the time of buying said coal, and before he shall take or remove said coal from the place of sale, procure a ticket from the owner of such coal, or the clerk, or person who shall be appointed by the owner to sell or deliver such coal, which ticket shall be given *gratis*, and shall express the day of the month and year, in which such coal is sold and delivered, and also the quantity of the coal then sold, and the names of the buyer and seller. Tickets for coals.
§. 19.

And in case any person shall remove or take away any quantity of coals from any colliery, without such ticket, or shall refuse to produce or shew such ticket, when required of him within the said colliery, or five miles thereof, such persons so offending, shall not only forfeit the coals so found on him, but shall also forfeit the horse and car employed in carrying such coal, which forfeiture shall be to the use of the owner or proprietor of such colliery from which such coal was so taken away. Forfeiture.

Provided, that if any person, who shall fairly buy any quantity of coals, shall by any accident lose his ticket, and for want of such ticket shall incur the penalty herein before mentioned, such person, shewing by the clerk of Loss of tickets.
of

Coals and Coalpits.

of the colliery's books, or by proper and sufficient proof, before the next justice of peace, that such coal was fairly and openly purchased from the owner or person appointed to sell the same, shall have his coal, together with his horse and car restored to him.

Absenting from
work.

8. If any miner, master, or other collier, or other person employed in any of the collieries or mines of this kingdom, shall absent himself from his work, in breach of his articles or contract with the owners of any colliery, or other mine, or shall engage himself, or hire with the owners, overseer, or director of any other colliery or mine, or any other person, without first obtaining a licence, or discharge in writing from the owners of the last work he was engaged by contract or agreement to work in; such miner, master, or other collier, on being duly convicted of such offence, shall, over and above the penalties provided by any former act, be committed to the common goal of the county wherein such offence is committed, there to remain for the space of two months, without bail or mainprize. *f.* 20.

Continuance of
this act.

9. So much of 1 G. 3 c. 17. as relate to colliers, miners, carmen, and buyers of coals, shall be continued to the first day of *May* one thousand seven hundred and seventy six, and to the end of the then next session of Parliament. 3 G. 3. c. 16. *f.* 3.

10. 1 G. 2. c. 24. If any persons shall wilfully and maliciously destroy any engine lawfully erected, or any shaft or passage or drains lawfully made, for working mines, or shall wilfully and maliciously do any damage to the same, to the value of five pounds, or shall wilfully and maliciously burn or set on fire any stack of coals or charcoal or vein or mine of coals under the ground, or any shafts or passages leading thereto, such offenders being thereof convicted, shall be adjudged felons without the benefit of clergy or of the statute. *f.* 3.

Coin.

For matters common to this with other treasons, see title *treason*.

Original of the
word.

1. **C**OIN, in *French*, signifieth a corner, and from thence hath its name (according to Lord *Coke*); because in antient time money was square with corners, as it is in some countries at this day. 1 *Inst.* 207.

Others derive this word, which in the old *French* is written *coin*: as also the *Italian cunio*, and the *Spanish cuno*, from the Greek word κοινός, *communis*; because money is the common mean or instrument of traffick.

But these derivations are too artificial. The word doth properly signify a wedge as the *Latin cuneus*; and hath a verb belonging to it in the several languages: and is translated to lawful money; either from the form of a wedge ingot or lingot (*linguetta*) in which bullion was transported from all antiquity: or else from the instrument, a wedge or chissel, with which in trade, these lingots were occasionally cut to the weight required, as they are at this day in the *East-Indies*, with sheers.

Value of coin.

2. The legitimation of money, and the giving it its denominated value, is one special part of the King's prerogative. 1 *H. H.* 188.

3. And

3. And the King may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. 1 *H. H.* 192. Legitimizing foreign coin.

And therefore both *English* money, coined by the King's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*. 1 *Inst.* 207.

4. But only gold or silver coin, and not brass or copper, are within this denomination. 1 *Haw.* 42. Copper coin.

And no person can be enforced to take in payment any money but of lawful metal, that is, of silver or gold. 2 *Inst.* 577. Except for sums under six pence. 1 *H. H.* 195.

5. By the statute of 25 *Ed.* 3. *ft.* 5. *c.* 2. It is made treason to counterfeit the coin of this realm: That is to say, whether the person utter it or not. 3 *Inst.* 16. 1 *Haw.* 42. Counterfeiting the coin of this realm.

6. By the act, 28 *Eliz.* *c.* 6. If any persons counterfeit any such kind of coin of gold or silver of other realms as is not the proper coin of this realm, nor permitted to be current within this realm, every such offence shall be judged misprision of high treason, and the offenders therein, their procurers, aiders, and abettors, being convicted of such offences shall be imprisoned, and forfeit such lands, goods, and chattels as in cases of misprision of treason. Counterfeiting foreign current coin.

7. And by the 8 *Ann.* *c.* 6. *f.* 1. No person except persons employed in his Majesty's mints, for the use of the mints only, or persons authorized by the treasury, shall knowingly make or mend or assist in the making or mending, of any puncheon, counter puncheon, matrix, stamp, dye, pattern, or mould, of steel or other metal, or of spaud, or fine founders earth, or sand, or other materials, in which there shall be the figure of either side, or flat of any gold or silver coin current, nor shall knowingly make or mend, or assist in the making or mending, of any edger or edging tool, not of common use in any trade, but contrived for making of money round the edges with letters, grainings or other marks, resembling those on money, nor any press for coinage, nor any cutting engine, for cutting round blanks by a screw out of flatted bars of gold, silver, or other metal, nor shall knowingly buy, sell, or conceal, or without authority or sufficient excuse knowingly have in his custody any such puncheon, &c. and if any person shall offend in the matters aforesaid, such offenders, their counsellors, procurers, aiders and abettors, shall be guilty of high treason. Making tools for coining.

8. If any person shall without authority knowingly convey or assist in the conveying out of his majesty's mint, any puncheon, or other instrument used about the coining of monies there, or any useful part of such instruments, as well the persons offending, their counsellors, procurers, aiders, or abettors, as also all persons knowingly receiving or concealing the same, shall be guilty of high treason. *f.* 2. Conveying tools out of the mint.

9. If any person other than the persons employed in his Majesty's mints, or such as shall have authority from the treasury, shall mark on the edges any current coin, or if any persons shall mark on the edges any diminished or counterfeit coin, with letters or grainings like those on the edges of money coined in his Majesty's mint, such offence shall be high treason, and the offenders, their counsellors, procurers, aiders, and abettors, being convicted, shall suffer death as in case of high treason. *f.* 3. Edging.

Gilding coins.

10. If any person shall colour, gild, or case over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling the current coin, or any round blanks of base metal, or of coarse gold or silver, of a fit size or figure to be coined, or shall gild over any silver blanks of a size and figure resembling the current gold coin, such persons, their counsellors, &c. shall be guilty of high treason.

Tools for coining found.

11. *Señ. 4.* If any puncheon, dye, stamp, edger, cutting engine, press, flask, or other instrument for coining or counterfeiting gold or silver monies, or any part of such tool, shall be hid in any place, or found in the house or possession of any person not employed in coining in his Majesty's mints, nor having the same by authority, any persons discovering are required to seize the same, and to carry them to some justice of peace, to be produced in evidence against any person who shall be prosecuted for such offence, and after they shall have been produced in evidence, they shall by order of the court, or in the presence of some justice of peace, in case there be no trial, be destroyed; and if any counterfeit or diminished money shall be produced in any court of justice in evidence or otherwise, the judges shall cause such monies to be cut in pieces in court, or in the presence of some justice of peace, and then to be delivered to such persons to whom the same shall appertain. *f. 5.*

Blanched copper.

12. If any person shall blanch copper for sale, or mix blancht copper with silver, or knowingly buy or sell, or offer to sale, blancht copper alone, or mixt with silver, or shall knowingly and fraudulently buy or sell, or offer to sale, any malleable composition, which shall be heavier than silver, and look and touch and wear like gold, but be worse than standard, or shall take, pay, or put off, any counterfeit milled money, or milled money unlawfully diminished and not cut in pieces, at a lower rate than the same shall import, such person shall be guilty of felony. *f. 6.*

No corruption of blood.

13. This act shall not make any corruption of blood, or make the wife of any offender to lose her dower, and persons accused of offences made treason or felony by this act, shall be tried by such evidence, and in such manner, as any offenders for counterfeiting the king's money. *f. 7.*

Defacing counterfeit money.

14. It shall be lawful for any person to whom silver money shall be tendered, any piece whereof shall be diminished otherwise than by reasonable wearing, or that by the stamp, colour or weight thereof, he shall suspect to be counterfeit, to cut or deface such piece; and if any piece so cut, &c. shall appear to be counterfeit, the person tendering the same shall bear the loss: but if the same shall be of due weight and lawful money, the person that broke or defaced the same, shall take the same at the rate it was coined for, and if any question arise, whether the piece be counterfeit, it shall be heard and determined by the mayor, bailiff, or other chief officer of any city or town corporate where such tender shall be made; and if out of any city, &c. then by the next justice of peace. *f. 8.*

Officers of the revenue.

15. All the officers and ministers concerned in the receipt of her Majesty's revenue, are required to cut, break, or deface, every piece of counterfeit or unlawfully diminisht silver money, tendered in payment to them for the use of her Majesty or for any part of the revenue. *f. 9.*

This act is made perpetual by Stat. 4 Geo. 1. cap. 9. Sect. 5.

16. By

16. By the 5 *El. c. 11.* Clipping, washing, rounding, or filing, for Clipping coins.
 lucre or gain, any the proper coin of this realm or the dominions thereof, or of any other realm current within this realm by proclamation, shall be adjudged treason in the offenders, their counsellors, consenters, and aiders. (*This law extends to Ireland.*)

17. And by the 18 *El. c. 1.* If any person shall, for lucre or gain, by any art, ways, or means, impair, diminish, falsify, scale, or lighten the proper coin of this realm, or any the dominions thereof, or the coin of this realm allowed to be current at the time of the offence committed, by the King's proclamation; he, his counsellors, consenters, and aiders shall be guilty of treason.

18. Lord *Hale*, speaking of copper halfpence and farthings, makes it a query, whether the counterfeiting of them be not treason within the statute of 25 *Ed. 3.* but inclines to the negative. 1 *H. H.* 195, 211, 212.

19. If any person shall falsly forge or counterfeit any such kind of coin Counterfeiting
 of gold or silver, as is not the proper coin of this realm, nor permitted to coin not current.
 be current within this realm; he, his procurers, aiders, and abettors shall be guilty of misprision of high treason. 14 *El. c. 3.*

20. If any person shall bring false money into the realm, counterfeit to Bringing in
 the money of *England*, knowing the same to be false, to merchandise or false money.
 make payment, in deceit of the king and his people; he shall be guilty of high treason. 25 *Ed. 3. st. 5. c. 2.*

Also, if any person shall bring from the parts beyond the sea, any forged and counterfeit money like to the gold or silver coin of foreign realms, current in payment within this realm by the King's sufferance and consent, knowing the same to be false and counterfeit, to the intent to utter or make payment of the same within this realm, by merchandizing or otherwise; he, his counsellors, procurers, aiders, and abettors shall be guilty of high treason. 1 & 2 *P. & M. c. 11. s. 2.*

Note: This must be brought from a foreign nation, and not from *Ireland*, or other place subject to the crown of *England*; because the counterfeiting there, is punishable by the laws of our King; as much as in *England*. 1 *Haw.* 43.

Sir *Michael Foster* observing upon these offences (and of the offence abovementioned, of counterfeiting foreign current coin) says, prosecutions for importing money counterfeit to the similitude of *English* coin have been very rare; and for the offences of counterfeiting foreign coin legitimated by proclamation, and of importing such coin, there can be none, as things stand at present, till the crown shall be advised to legitimate some species of foreign coin. I know of none (says he) now current among us that is legitimated, and most probably none will. For if the offences of counterfeiting and diminishing foreign coin, and of importing such counterfeit and diminished coin, which are great evils and daily growing, were made more penal than they are at present, he says he knows of no good end that could be answered by legitimating any species of it; on the other hand, there seem to be great inconveniencies that would attend it. *Fost.* 227.

Uttering false
money.

21. If one person counterfeits, and by agreement before the counterfeit-
ing, another person is to take off and vent the counterfeit money, such other
is an aider and abettor, and consequently a principal traytor (for in high
treason there are no accessaries.) 1 *H. H.* 214.

If one person counterfeits, and another (knowing that he did so) puts
it off, but without any such previous agreement; such other person
seems to be all one with a receiver of him, because he maintains him.
1 *H. H.* 214.

If one person counterfeits, and another person know that he did so, and
doth neither receive, maintain, or abet him, but conceals his knowledge;
this is misprision of treason. 1 *H. H.* 214.

Having false
money in pos-
session.

22. If false or clipt money be found in a man's hands; if he be suspici-
ous, he may be arrested till he have found his warrant. 3 *Inst.* 18. *Hale's*
Pl. 21. 1 *Haw.* 43.

Bail.

23. By the 3 *Ed.* 1. c. 15. Persons taken for false money are not bail-
able by justices of the peace.

But they must take the examinations and informations, and bind over
the witnesses to the proper court, and commit the persons accused. 1
H. H. 372.

Evidence.

24. It is not necessary there should be two witnesses in cases of counter-
feiting the coin, as it is in other high treasons; but persons may be con-
victed according to the course of the common law, by one witness only.
1 *H. H.* 318, 328.

Judgment.

25. The judgment for high treason, relating to the coin, is, to be drawn
to the place of execution, and there hanged by the neck till he be dead.
2 *Haw.* 444.

But it is generally provided by the several statutes, that this shall work
no corruption of blood, nor loss of dower.

Commitment.

Without war-
rant.

ANciently there was more felons committed to goal without mitti-
mus in writing, than were with it: such were all the commit-
ments by constables, watchmen, and private persons arresting for felony,
and bringing to the common gaol, long before there were any justices
of the peace; and yet mittimus, are not of so ancient date even as they.
1 *H. H.* 610.

But now, since the *habeas corpus* act, a commitment in writing seems
more necessary than it was in former times; otherwise the prisoner
may be admitted to bail upon that act, whatsoever his offence may
have been.

Commitment,
when.

When a statute appoints imprisonment, but limits no time when, it is to
be understood that he shall be imprisoned presently. *Dalt. c.* 170.

Concerning which I will set forth,

I. Who

- I. Who may be committed.*
- II. To what place.*
- III. The form of the commitment.*
- IV. Charges of the commitment.*
- V. That the gaoler shall receive the prisoner.*
- VI. Shall certify the commitment.*
- VII. Commitment discharged.*

I. Who may be committed.

Who may be committed.

1. There is no doubt, but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 *Haw.* 116. Persons not bailable, or not finding bail.

2. And it is said, that wheresoever a justice is impowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the goal, to remain there till he shall comply. 2 *Haw.* 116. Persons guilty of contempt.

3. If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 *H. H.* 121. Persons charged with felony.

4. But if he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice may discharge him; as if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which tho' there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, tho' it be by misadventure, or self defence (which is not properly felony), or in making an assault upon a minister of justice in execution of his office (which is not at all felony), yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed. 2 *H. H.* 121. Persons charged on suspicion.

5. But commitment by the justices of the peace almost in all cases (except for the peace, good behaviour, felony, or higher offences) is but to retain the party till he hath made fine to the King; and therefore if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt. c.* 170. Persons not paying their fine.

II. To what place.

To what place.

1. All felons shall be committed to the common gaol, and not elsewhere. To the gaol. 5 *H. 4. c.* 10.

2. But

House of correction.

2. But vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper. 6 G. c. 19.

Stocks.

3. And they may commit other offenders to the stocks, or other custody, by particular statutes.

Different county.

4. Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. *Dalt. c. 170.*

Yet if he escapes, and is taken on fresh suit, in another county, he may be carried back to the county where he was first taken. *Dalt. c. 170.*

Form:

III. Form of the commitment.

In whose name.

1. It must be in writing, either in the name of the King, and only testified by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw. 119.*

Yet the mention of the name and authority of the justice, in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus, is sufficient warrant to the gaoler; for it may be supplied by averment, that it was done by the justice. 2 *H. H. 122.*

The party's name.

2. It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add, that he refuseth to tell his name. 1 *H. H. 577.*

Oath.

3. It is safe, but not necessary, to set forth, that the party is charged upon oath. 2 *Haw. 120.*

Cause.

4. It ought to contain the cause, as for treason, or felony, or suspicion thereof; otherwise if it contain no cause at all, if the prisoner escape it is no offence at all; whereas if the mittimus contained the cause, the escape were treason or felony, tho' he were not guilty of the offence; and therefore for the King's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 *Inst. 52.*

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law. 2 *Inst. 591.*

Also, it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony *for the death of such an one*, or for burglary *in breaking the house of such an one*; and the reason is, because it may appear to the judges of the King's bench, upon an *habeas corpus*, whether it be felony or not. 2 *H. H. 122.*

But the want hereof seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment to excuse the gaoler or officer, that the matter was not felony. 1 *H. H. 584.*

5. But

5. But it must have an apt conclusion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. 2 Haw. 120. 2 H. H. 123. Conclusion.

But if the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that if the matter appear to be such, for which he is to remain in custody, or to be bailed, he shall be bailed or committed as the case requires, and not discharged, but the wrong conclusion shall be rejected. 1 H. H. 584.

It is also to be observed, that a commitment grounded on an act of parliament, ought to be conformable to the method prescribed by it. As where the overseers were committed for refusing to account, and the warrant concluded in the common form, until they be duly discharged according to law, upon the return of an *habeas corpus* the court held the commitment void, because the warrant ought to have concluded, there to remain until he shall account, as the 43 *El. c. 2.* doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the first case, the commitment must be, until discharged according to law; but in the latter, until he comply. 2 Haw. Not. 33.

Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain at the discretion of the court. *Dalt. c. 170.*

6. It must be under seal; and without this, the commitment is unlawful, the gaoler is liable to a false imprisonment, and the wilful escape by the gaoler, or breach of prison by the felon, makes no felony. Seal. 1 H. H. 583.

But this must not be intended of a commitment by the sessions, or other court of record; for there the record itself, or the memorial thereof, which may at any time be entered of record, are a sufficient warrant, without any warrant under seal. 1 H. H. 584.

7. It should also set forth the place at which it is made. 2 Haw. 119. Place.

8. It must also have a certain date, of the year and day. 2 H. H. 123. Time.

IV. Charges of the commitment.

1. There shall be paid to every constable, who by virtue of a *mittimus* under the hand and seal of any justice of the peace for treason or felony, shall carry to and safely lodge in the county gaol, any person committed to him by such justice, the sum of three pence for each mile such person so committed shall be carried, and also the like sum shall be paid to each of two *protestants* armed with fire-arms, who shall go along with such constable to the county gaol to guard such prisoners, which sums shall be raised by the grand juries of the respective counties. 17 G. 2 c. 6. Charges to be paid to constables, &c. Sect. 5.

2. And in case there shall be more prisoners than one to be conveyed to gaol, the said justice shall appoint as many *protestants* with fire-arms to guard such prisoners, as shall be necessary for their safe conveyance to goal, each of whom shall be intitled to the like sums of three pence a mile, to be raised as aforesaid. In case of more than one prisoner.

Commitment.

*V. Gaoler shall receive the prisoner.*Gaoler refusing
to receive.

If the gaoler shall refuse to receive a felon, or take any thing for receiving him, he shall be punished for the same, by the justices of gaol delivery. 4 *Ed. 3. c. 10. Dalt. c. 170.*

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken; and that town shall be charged with the keeping of him, until the next gaol delivery: or the person that arrested him, may in such case keep the prisoner in his own house, as it seemeth. *Dalt. c. 170.*

But in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. 2 *Haw. 118.*

*VI. The gaoler shall certify the commitment.*Commitment
to be certified.

By the 3 *H. 7. c. 3.* The sheriff or gaoler shall certify the commitments, to the next gaol delivery.

*VII. Commitment discharged.*Commitment
discharged.

It seems that a person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one but the King, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose by the justices of gaol delivery. But if a person be committed on a bare suspicion, without an indictment for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be safely dismissed without any farther proceeding, for that he who suffers him to escape is properly punishable only as an accessory to his supposed offence; and it is impossible that there should be an accessory, where there can be no principal; and it would be hard to punish one for a contempt, in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless. 2 *Haw. 121.*

Mittimus for felony.

County of **S**IR John Pennington, *baronet, one of the justices of our Dublin. lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; To the keeper of the gaol of our said lord the king at ——— in the said county, or to his deputy there, and to each of them,*

Commitment.

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hem, greeting. *Whereas A. O. late of — in the said county, labourer, hath been arrested by the constable of — in the said county, for suspicion of a felony by him, as it is said, committed, in stealing a black mare, of the value of 40s. the property of A. P. of — in the said county, yeoman: Therefore on the behalf of our said lord the king, I command you and each of you, that you or one of you receive the said A. O. into your custody in the said gaol, there to remain till he be delivered from your custody by the law and custom of —. Given under my hand and seal at — in the said county, the — day of — in the — year of the reign of our said lord —.*

Another.

County of **J.** P. esquire, &c. To the keeper of the common gaol at — Dublin. *in the said county, or to his deputy there: These are in his majesty's name to charge and command you, that you receive into your said gaol, the body of A. O. late of — in the said county, yeoman, taken by A. C. constable of — in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing — And that you safely keep the said A. O. in your said gaol, until the next general gaol delivery for the said county [If he be notailable: or ifailable, then thus] until he shall thence be delivered by due course of law. And hereof fail you not, &c.*

Another.

County of **J.** P. esquire, &c. To the keeper of — I send you here-Dublin. *withal the body of A. O. late of — in the said county, labourer, brought before me this present day, and charged with the felonious taking and carrying away forty sheep, the property of — which also he hath confessed upon his examination before me [by which he is notailable]: Therefore these are on the behalf of our said lord the king to command you, that immediately you receive the said A. O. and him safely keep in your said gaol, until that he be thence delivered by the due order of law. Hereof fail you not, as you will answer for your contempt at your peril. Given under my hand and seal at — &c.*

Or thus, in the King's name.

County of **G**EOERGE the third by the grace of god, of Great Britain, Dublin. *France and Ireland, king, defender of the faith, and so forth: To the keeper of our gaol at — in our said county of W. or to his deputy, greeting: Whereas A. O. late of — in our said county, yeoman, is arrested for suspicion of felony, by him, as it is said, committed, in feloniously taking and carrying away — of the value of — the property of — We therefore command you, and each of you, that you receive him the said A. O. into your custody in our said gaol, or that one of you, do receive him, there to remain till he be delivered from your custody, according to*
Y the

Commitment.

the law of our kingdom of ——. Witness J. P. esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at ——— in the said county, the — day of ——— in the — year of our reign.

General warrant of commitment.

County of **J.** P. esquire one of the justices of our lord the king, assigned Dublin. **J.** to keep the peace within the said county, To the constable of ——— in the said county, and to the keeper of ——— at ——— in the said county.

These are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said ——— the body of A. O. &c. And you the said keeper are hereby required to receive the said A. O. into your custody in the said ——— and him there safely to keep, &c. Given under my hand and seal, the — day of ——— in the — year of the reign of his said majesty king George the third.

Common Prayer.

Impugners of the book of common prayer.

1. **I**mpugners of the form of worship in the church of England, established by law, and contained in the book of common prayer; of the 39 articles; of the rites and ceremonies of the church; and of episcopal government; shall be excommunicated *ipso facto*, and not restored but by the bishop or archbishop on their repentance. *Can. 5, 6, 7.*

Ministers derogating from the book of common prayer.

2. If any parson, vicar, or other minister, that ought to use the common prayer, or to minister the sacraments, shall refuse to do the same, or (wilfully standing in the same) shall use any other form, or shall speak any thing in derogation of the same book or of any thing therein contained; he shall, on conviction, for the first offence forfeit to the king one year's profit of all his spiritual promotions, and be imprisoned for six months; for the second offence, shall be deprived of all his spiritual promotions, and be imprisoned for a year; and for the third offence, shall be deprived of all his spiritual promotions, and be imprisoned during life. And if he has no spiritual promotion, he shall for the first offence be imprisoned for a year; and for the second offence, during life. *1 El. c. 2. s. 4—8.*

But this shall not restrain the spiritual court, from proceeding against these offenders; and they may be deprived by the said court, according to the course of the spiritual law, for the first offence. *id. s. 16, 23. 1 Haw. 9.*

Any person depraving the book of common prayer.

3. If any person whatsoever shall in plays, songs, or by other open words, speak any thing in derogation of the same book, or any thing therein contained; or shall by open fact cause or procure any minister in any place to say common prayer openly, or to minister any sacrament, in other form, or shall interrupt or let any minister to say the said common prayer; he shall, (being indicted for the same at the next assizes) forfeit to the king for the first

Common Prayer.

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first offence 100 marks, and for the second 400 marks; which if not paid in six weeks after conviction, he shall suffer six months imprisonment for the first offence, and 12 months for the second;) and for the third offence shall forfeit all his goods and chattels, and be imprisoned during life. 1 *El. c. 2. f. 9, 10, 11, 12, 13. 20.*

4. Where an incumbent resides upon his living, and keeps a curate, the incumbent himself (not having lawful impediment to be allowed by the bishop) shall at least once a month openly and publickly read the common prayer, and (if there be occasion) administer the sacraments, and other rites of the church; on pain of 5*l.* to the poor, on conviction by confession, or oath of two witnesses, before two justices; and in default of payment in ten days, the same to be levied by the churchwardens or overseers by distress and sale, by warrant of such justices. 13 & 14 *C. 2. c. 4. f. 7.*

Resident incumbent to read the common prayer once a month.

Confession.

CONFESSION is twofold, either *express*, or *implied*.

An *express* confession is, where a person directly confesses the crime with which he is charged; which is the highest conviction that can be.

Express confession.

2 *Haw. 333.*

But it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H. 225.*

An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession. 2 *Haw. 333.*

Implied confession.

It seems that the confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 2 *Haw. 429.*

Confession of the defendant.

All those who on their examination own themselves guilty of a felony alledged against them, and are charged in their *mittimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent. 2 *Haw. 97.*

Excludes from bail.

Conspiracy.

I. *What it is.*

II. *How punishable.*

I. *What it is.*

1. **B**Y the common law there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish

By the common law.

Conspiracy.

impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 Haw. 190.

Who are conspirators.

2. And conspiracy by statute is as follows: *Conspirators are they, that do confederate or bind themselves by oath, covenant, or other alliance, that every of them, shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and such as retain men in the country, with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers: And stewards and bailiffs of great lords, who by their office or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estates of their lords or themselves.* 33 Ed. 1. ft. 2.

False indictment.

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord Coke, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 Haw. 189. L. Raym. 1169.

But an action will not lie for the conspiracy, unless it be put in execution; for in such case, the damage is the ground of the action. L. Raym. 378.

One alone cannot be guilty.

Also it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest, is the acquittal of that one also: and upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but as one person in law: but it is certain, that an action on the case, in the nature of a conspiracy, may be brought against one only: also, it hath been resolved, that if such an action be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. 1 Haw. 192.

Case of Kinnersey.

Also in the case of *K. against Kinnersey and Moore, T. 5 G.* An information was brought, setting forth that the defendants, being evil disposed persons, in order to extort money from my lord *Sunderland*, did conspire together to charge my lord with endeavouring to commit sodomy with the said *Moore*. The defendant *Kinnersey* only appears, and pleads to issue, and is found guilty. And now exception was taken in arrest of judgment, that to every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty, and the other possibly may be acquitted. But it was answered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himself, and is not concluded by the verdict as *Kinnersey* is, yet as the matter now stands, *Moore* himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one, before the trial of the other. And a case was quoted, where several were indicted for a riot, with many others, and two only were found guilty; and it was objected, that there must be three to make a riot; but upon the words,

Conspiracy.

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words, *with many others*, judgment was given against the defendants. And the court over-ruled the exception. And the defendant had sentence. And in the *Easter* term following, *Moore* also was convicted and had judgment. *Str.* 193.

And, *E.* 18 G. 2. K. against *Eliz. Niccols*. She was indicted for conspiring with *Tho. Bygrave*, unjustly to charge *William Frankland* with a robbery, and for that purpose going before a justice, where *Bygrave* swore it upon him. *Niccols* only came in, and pleaded not guilty. And the jury found that she was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conspiracy, and here is but one convicted. But the court over-ruled this, on the authority of *Kinnerfsley's* case, in which case there was a possibility of contradictory verdicts, which here cannot be. *Str.* 1227. Case of *Eliz. Nichols*.

II. How punished.

1. It is clear, that those who are convicted of conspiracy at the suit of the party, shall have judgment of fine and imprisonment, and to render the plaintiff his damages. *1 Haw.* 193. On action.

2. Also it is certain, that he who is convicted at the suit of the king, of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law (whereby he is disabled from being put upon any jury, or to be sworn as a witness, or even to appear in person in any of the king's courts), and also that his houses, lands, and goods shall be seized into the king's hands, and his houses and lands stripped and wasted, his trees rooted up, and his body imprisoned: And this is commonly called *villainous* judgment, and is given by the common law, and not by any statute, and is said generally in some books to be the proper judgment upon every conviction of conspiracy at the suit of the king, without any restriction to such as endangered the life of the party; but this point doth not seem to be any where settled. *1 Haw.* 193. On indictment or information.

In the case of *Kinnerfsley* and *Moore* above-mentioned, *Kinnerfsley* was sentenced to be fined 500*l.* to suffer a year's imprisonment, and to find sureties for his good behaviour for seven years. *Moore* was sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties in like manner for seven years. *Str.* 196.

Constable.

THE office of a constable, in executing of warrants, is treated of under the titles **Arrest** and **Warrant**; and in like manner the other particulars of his duty may be found under the respective titles throughout the book; this title treating only of the office of a constable in general.

I. Of

- I. *Of the antiquity and original of constables.*
- II. *Who shall be a constable.*
- III. *How chosen and sworn.*
- IV. *His power as a conservator of the peace.*
- V. *His duty as a subordinate officer to justices of the peace.*
- VI. *His indemnity and protection in his office.*
- VII. *Concerning the expences of his office.*
- VIII. *Concerning his account and removal from his office.*

I. *Of the antiquity and original of constables.*

Antiquity of
high constables.

2. By the statute of *Winchester*, In every hundred and franchise two constables shall be chosen to make the view of armour; and they shall present defaults of armour, and of suits of towns, and of highways, and such as lodge strangers in uplandish towns, for whom they will not answer. 13 Ed. 1. ft. 2. c. 6.

And from hence Lord Coke, and others will have it, that high constables are no ancients than this statute: but Mr. Hawkins (agreeably with Lambard, Dalton, and other authorities) says, that it seems to be the better opinion, that both constables of hundreds, which are commonly called high constables, and also constables of tythings, which are at this day commonly called petty constables, or tythingmen, were by the common law, and not first ordained by the said statute of *Winchester*; for that statute doth not say, that there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it. 2 Haw. 61.

Office of high
constable.

In short, the truth of the matter seems to be this: The far greatest part of the business of high constables at this day, is not at all appropriated to them, as high constables; but only as officers to execute the precepts of the justices of the peace, which any other person may do as well as they. The original and proper authority of an high constable, as such, seems to be the very same, and no other, within his hundred, as that of the petty constable within his vill; and therein most probably, he is coeval with the petty constable.

Other branches
by statutes.

The other usual branches of his office have been super-added to their office, for the like reason of convenience, by sundry acts of parliament, such as the issuing precepts for the licensing of alehouses, for levying the county rates, and for returning lists of jurors; for that one person can do all the same much easier and cheaper, than so many different persons.

II. *Who shall be a constable.*

Women.

1. It hath been said, that a custom in a town, that the inhabitants shall serve the office of constable by turns, according to the situation of their several

several houses, is not good; for that by such a course, it may come to a woman's turn to be a constable, as inhabitant of one of those houses; yet we find such customs allowed to be good in later books; and it seems, that the consequence of the reasoning above-mentioned may well be denied, since a woman in such case may procure another to serve for her. 2 *Haw. 63.*

2. Also it seems, that a practising physician, being chosen constable in Physicians. pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind, and his calling is private. 2 *Haw. 63.*

3. Also it seems certain, that if a sworn attorney, or other officer, of the Attornies. courts at *Westminster*, be chosen into this office, he may have a writ of privilege for his discharge, by reason of his necessary attendance in those courts: And it hath been resolved, that such officers shall have this privilege, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom, in respect of their estates, or otherwise; for that no such custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them. 2 *Haw. 63.*

4. And upon the like reasons, it is taken for granted, that practising Barristers at law, servants to members of parliament, have the same privilege; but there seem to have been no resolutions to this purpose. 2 *Haw. 63.*

5. But it hath been holden, that a captain of the king's guards, being Captain of the guards. presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he is bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom. 2 *Haw. 63.*

6. Yet if such an officer as before mentioned, or a gentleman of quality Where there are others sufficient. who hath no such office, or a practising physician, be chosen constable of a town, which hath sufficient persons besides to execute this office, and no special custom concerning it; perhaps he may be relieved by the King's Bench: but it seems that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. But these points seem not to be settled. 2 *Haw. 63.*

7. By the 6 G. c. 5. s. 9. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, shall, from the time of his subscription and taking the oaths, be exempted from the office of constable. Dissenting teachers.

8. Inasmuch as the office of a constable is wholly ministerial, and no way judicial, it seems, that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; yet it doth not seem to be settled, that a constable can make a deputy, without some special cause. 2 *Haw. 62.* Whether he may appoint a deputy.

And the superior must be answerable for his deputy, upon any miscarriage: unless the deputy is duly allowed and sworn; for then he is constable. *Wood b. 1. c. 7.*

9. And by 6 G. c. 5. s. 4. If any person dissenting from the church of England, shall be chosen constable, and shall scruple to take upon him the office, in regard of the oaths, or any other matter required to be done in respect of Dissenters appointing a deputy.

respect of such office; he may execute it by a sufficient deputy by him to be provided, to be allowed by such persons, and in such manner, as such officer should have been allowed.

III. How chosen and sworn.

By whom to
be chosen.

1. It being said in some books, that both high and petit constables are to be chosen and appointed by the sheriff in his torn (or by the lord of the leet) and by others, that they are to be chosen by the decennary, it seems difficult to determine, to whether of them the power of chusing doth of right belong. 2 *Haw.* 62.

By whom to
be sworn.

2. Yet it seems clear, that whether a constable be to be chosen by the sheriff, or decennary, yet he is to be sworn, and placed in his office by the sheriff, as being judge of the court (or by the lord of the leet). 2 *Haw.* 62.

Custom of
chusing

3. Also it seems certain, that a custom for chusing a constable either way is good; and it seems to have been the opinion of the makers of the act of 13 & 14 C. 2. hereafter following, that the lords of the courts leet have this power of common right, and consequently the sheriff in his torn, where there is no court leet. 2 *Haw.* 63.

Anciently the practice was, that in every hundred where there was a feudal lord, the constables were sworn in and admitted by the lord or his steward in his leet; but where there was no such feudal lord, the sheriff in his torn had the swearing and placing of them in: Also if there was no feudal lord of the hundred, an annual officer was chosen, who was to preside over the whole hundred, who was called the high constable; but if the hundred was feudal, as it often anciently was, then such lord of the hundred administered the office himself. 1 *Bac. Abr.* Const. A.

Chusing high
constables.

4. But now the usual manner is, that the high constables of hundreds be chosen either at the sessions, or by the greater number of the justices of the division; and likewise that they be sworn at sessions, or by warrant from the sessions: which course hath been often allowed and commended by the justices of assize. *Dalt. c.* 28.

And the reason thereof may be this, as hath been intimated above; namely, that their office at present doth not so much consist in executing the office of high constable as such, as in executing the justices precepts, which they may do for the most part, whether they be indeed high constables or not.

Petty constables
appointed
by justices of
the peace.

5. And moreover, every petty constable, being a principal peace officer, and it being necessary for the preservation of the peace, that every vill should be furnished with one; the justices of the peace have ever since the institution of their office, taken upon them as conservators of the peace, not only to swear the petty constables, which have been chosen at a torn or leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriffs or lords to hold their courts, or to take care that such officers are appointed in them. And this power of justices of the peace having been confirmed by the uninterrupted usages of many ages, shall not now be disputed, but shall be presumed to have been grounded on sufficient authority. And some have carried this point so far, as to allow the

the justices at their sessions, to swear one who was chosen at the leet, and unduly rejected by the steward, who had sworn another in his place. 2
Haw. 65.

6. By the act of 1 *Geo. 2. cap. 13. sect. 13.* The constable of each respective parish, shall, before he enters upon his office, make oath before some justice of the peace in the parish where he lives, or some neighbouring parish, that he will honestly and indifferently perform his duty in all things required by this act, without favour or affection, malice, or ill will, to any person, and on failure so to do, shall forfeit twenty shillings, to be levied as the penalties upon labourers are by this act to be levied; and the justice of the peace before whom such oath shall be taken, shall give a certificate thereof to the person taking the same without fee. Oath of constables.

7. And if any parish shall be so large, that one constable shall not be sufficient to do the whole office of a constable within the said parish, it shall be lawful to appoint two or more constables for such parishes, in such manner, as such one constable was formerly appointed for the same, which new constables shall have the same authority, as any other constable by law ought to have. Two or more in large parishes.

8. And by the 7 *Geo. 2. cap. 12. sect. 3.* Every high constable who shall be appointed for any barony, except the city of *Dublin* and county of *Dublin*, shall be appointed by a presentment of the grand jury of such county, at the general assizes held for the same, to be confirmed by the court, and not at any quarter-sessions. Appointed by the grand jury.

9. And such high constable shall continue in his office for one year after such appointment, unless sooner removed by the presentment of such grand jury, to be so confirmed as aforesaid; and every such high constable shall, at the expiration of one year, be discharged from the said office, provided he has duly accounted for the publick money, which came to his hands, and shall produce to the grand jury at the assizes an authentick discharge for the same, under the hand of the treasurer of such county. To continue one year.

10. By the act 23 *Geo. 2. cap. 14. sect. 1.* If any seneschal of a manor shall neglect to hold his leet, at the time when the same ought to be held for appointing petty constables in such leet, or if such leet being held, shall neglect to appoint petty constables, and if the sheriff of any county having the appointment of petty constables in his torn, shall neglect to hold his torn, at the time when the same ought to be held for appointing such constables therein; or if such torn shall be held, there shall be a neglect of appointing petty constables therein, or if from any other cause no petty constable shall be duly appointed for any district, at the time when such constable ought to be appointed, the justices of the peace for the county in which such torn or leet is, are required at their next sessions to appoint for that time, and to swear petty constables for the several districts and divisions within the precincts of such torn or leet respectively. Seneschals neglecting to hold their leet.

11. And if the said justices of the peace shall neglect so to do, the justices at the next assizes for such county, and the judges of the King's Bench, in term for the county of *Dublin*, upon presentment of the grand jury of such county, shall appoint, swear, or order to be sworn before any justice of the peace of such county, the persons named in such presentment, into the office of petty constable for the several districts and divisions so neglected. *sect. 2.* Justices may appoint.

Grand jury may appoint.

Constable.

12. Provided that the petty constables so appointed by the said justices of the peace and judges of assize, and judges of the King's Bench, shall not be compelled to serve for a longer time than they would have been respectively obliged to serve in the said office, in case they had been duly appointed in the torn or leet. *sect. 3.*

Petty constables dying or removing.

13. If any petty constable during the time of his serving in the said office, shall die or remove out of the precincts of the district or division, for which he was appointed, or shall be lawfully removed from the said office, it shall be lawful for any two justices of the peace for the county, to appoint and swear a new petty constable in his room, to continue until the next torn or leet, or in default of such torn or leet being held at the usual time, or appointing thereat a petty constable until the next sessions of the peace after such usual time, and in default of such next sessions until the next assizes, at which next torn, leet, sessions, or assizes, as the case shall be, the sheriff, seneschal, justices, or judges may approve of the constable appointed as aforesaid and sworn, or if they think fit, may appoint another to serve the remainder of the time of the constable so dying or removed.

Constable refusing to be sworn.

14. Constables lawfully chosen, if they shall refuse to be sworn, a justice of the peace may bind them over to the assizes or sessions. *Dalt. c. 28.*

How punished.

15. But it seemeth that the sheriff, or steward of the leet, cannot lawfully commit them for such refusal, without more; but it is said, that if the party be present in the court, he may be fined; and that if he be absent, and have a certain time and place appointed him by the sheriff or steward, for the taking of the oath before a justice of the peace, and have also express notice of such appointment, and be presented at the next court, for having refused to take it accordingly, he may be amerced: also it seems, that in either case he may be indicted (A) either at the assizes or sessions. And it is adviseable in all pleadings, in any action concerning such a fine or amerciements, and in all indictments for such refusal, especially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and before whom the court was holden: and it hath been adjudged, that it is insufficient to say in general, that the party was duly elected, or lawfully elected, or that he had notice, without setting forth the special circumstances thereof. Also it is said to have been adjudged, that an indictment for not finding a sufficient person to serve the office of constable, without shewing that the party refused to serve it himself, is insufficient. 2 *Haw. 64.*

Constable's oath.

16. There is a long form of a constable's oath in *Dalton*, which is adopted by Mr. *Barlow*, expressing his duty in many instances; but as that form nevertheless doth not contain the hundredth part of the constable's duty, nor indeed the most material instances of it, it may be more eligible (as no particular form is directed by any statute) to swear him (B) to the due execution of his office in general, than to descend to those particulars; lest by mentioning some parts of his duty, and not others, he may be induced to think, that those others are not so necessary.

IV. His power as conservator of the peace.

Constable a conservator of the peace.

1. Every high and petty constable are by the common law conservators of the peace. 2 *Haw. 33. Crom. 6. Dalt. c. 1.*

2. And

2. And therefore if any man shall make an affray or assault upon another in the presence of the constable, or shall threaten to kill, beat, or hurt another, or shall be in a fury ready to break the peace; the constable may commit him to the stocks, or other safe custody for the present, and after may carry him before a justice, or to gaol, until he shall find surety for the peace, which surety the constable himself may also take by obligation, to be sealed and delivered to the king's use, and if the party will not find surety to the constable, he may imprison the party until he shall do it. *Dalt. c. 1.*

May commit for an affray in his presence.

3. But he may not require surety of the peace, unless the offence be upon his own view, and not if it be committed out of his sight; for he cannot take any man's oath that he is afraid of death, because he is not a judge of record; which is the reason that an obligation taken by him, shall be in his own name, and not in the king's name: and the same shall be certified at the sessions of the peace. *Cro. Eliz. 375, 376.*

But not when he is absent.

V. His duty as a subordinate officer to justices of the peace.

It hath been always holden, that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it. *2 Haw. 262.*

Subordinate to the justices of the peace.

VI. His indemnity and protection in his office.

1. If an action is brought against a constable, for any thing done by virtue of his office; he, and also all others which in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers, he shall have double costs. *10 Car. 1. sess. 2. c. 16.*

Double costs.

2. And such action shall be laid in the county where the fact was committed, and not elsewhere. *Ibid.*

Proper county.

5. And if the constable is assaulted in the execution of his office, he need not go back to the wall, as private persons ought to do: and if in the striving together, the constable kills the assailant, it is no felony; but if the constable is killed, it shall be construed premeditated murder. *Hale's Pl. 37.*

Constable assaulted need not to back to the wall.

1 H. H. 457.

VII. Concerning the expences of his office.

There shall be paid to every constable, who by virtue of a *mittimus* under the hand and seal of any justice of the peace for treason or felony, shall carry to and safely lodge in the county gaol, any person committed to him by such justice, the sum of three pence for each mile such person so committed shall be carried. *17 Geo. 2. cap. 6. sect. 5.*

VIII. Concerning his account and removal from his office.

Every person who shall serve one year in the office of high constable, and shall have accounted for all the publick money within his barony or district, and be legally discharged from the said office, shall not be compelled by any grand jury to serve again in the same office, during seven years next ensuing such discharge, and if he shall be appointed by the presentment of any grand jury, such presentment shall not be confirmed by the judges of assize. 23 Geo. 2. cap. 14. sect. 4.

All arrears of publick money due from any high constable in his life time, may after the death of such high constable be recovered by the treasurer of the county, against the executors or administrators of such high constable out of his assets in a summary way, before the justices of assize by civil bill in the name of the said treasurer, although the sum so sued for exceed twenty pounds, provided the person so sued be duly served with a summons by the space of twelve days at least, before the first day of the assizes, in which case the defendants shall have all equitable defences, and each party the like benefit of appeal, as in other cases prosecuted by civil bill, provided also that such bill be prosecuted within two years next after the death of such high constable. 7 Geo. 2. cap. 12. sect. 4.

2. And in such manner as constables are to be chosen, in the same manner, and by the like authority are they to be removed; so as if there shall be cause to remove and put an high constable from his place, it hath not been thought fit, that any one or two justices should do it upon their discretion, but that it should be done by the greater part of the justices of that division, and that for some just cause; or else that it be done at the sessions. Dalt. c. 28.

And it seems clear, that the sheriff or steward of the leet, having power to place a constable in his office, have by consequence a power of removing him. 2 Haw. 63.

And also the justices of the peace have always used, for good cause, to displace all such constables, as have been chosen and sworn by them. 2 Haw. 65.

And if the court, or other judge, shall refuse to discharge a constable, the King's Bench may compel them by *mandamus*. 2 Haw. 65.

A. Indictment for not taking the office.

THE jurors for our lord the king upon their oath present, that A. O. late of _____ in the township of _____ in the said county, yeoman, on the _____ day of _____ in the _____ year of the reign of _____ and long before, and always after until the day of the preferring of this indictment, was and is an inhabitant and residing within the township of _____ aforesaid in the county aforesaid, and an able person to serve the office of constable for the same township; and he the said A. O. on the said _____ day of _____ in the year aforesaid, in the township aforesaid, at the court leet of A. L. lord of the manor of _____ aforesaid, holden before A. S. gentleman, steward of the said court, by the suitors
*of

of the said court, was elected and chosen, according to the ancient custom of chusing constables for the said township, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; [or otherwise as the custom shall be for chusing constables] and that the said A. O. afterwards, to wit, on the——day of——in the year aforesaid, at the township of——aforesaid, had due notice given to him by A. B. bailiff of the aforesaid manor, of his being so elected and chosen constable as aforesaid, and then and there was by him the said A. B. required to appear before J. P. esquire, then and yet one of his Majesty's justices assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, on the said——day of——in the year aforesaid, to take his oath for the due executing the said office of constable for the same township, according to the duty of that office; nevertheless the said A. O. his duty in that behalf not regarding, but contriving and intending wholly to neglect to serve the said office of constable, after he the said A. O. was so elected and chosen into the said office as aforesaid, to wit, on the said——day of——in the year aforesaid, and continually afterwards until the day of taking this inquisition, at the township aforesaid, in the county aforesaid, unlawfully and contemptuously did refuse, and still doth refuse, to take his said oath for the due executing the said office of constable, and in any wise to execute the same office, to the great hindrance of justice, in contempt of our said lord the king, and to the evil example of all others in the like case offending, and against the peace of our said lord the king.

B. Constable's oath.

YOU shall well and truly serve our sovereign lord the king, [and the lord of this leet, if sworn in a court leet] in the office of constable, for the township of——for the year ensuing [or, until you shall be lawfully discharged therefrom; or, until another shall be sworn in your place:] You shall well and truly do and execute all things belonging to the said office, according to the best of your skill and knowledge: So help you God.

Conviction

THE power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace; but the intendment will be against it.

Where a special power is given to a justice of the peace by act of parliament, to convict an offender in a summary manner, without a trial by jury, it must appear that he hath strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed never-

Conviction.

nevertheless according to the course of the common law in trials by juries, and consider himself only as constituted in the place both of judge and jury.

There must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then, if the person is found guilty, there must be a conviction, judgment, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute.

And in the conclusion, there must be a *record* of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

The difficulty of drawing up a conviction in due form, hath induced the legislature to institute a more apt and compendious method in divers instances; and it were to be wished, in ease of the justices, that this provision might be made more general. These summary forms of convictions, which are specially directed by act of parliament, are interspersed throughout this book under the titles to which they do respectively belong.

Other forms of convictions, which are left at large according to the course of the common law (having no prescriptive form of words directed by any act of parliament) are likewise drawn forth at length under divers titles; particularly concerning such matters as have been often controverted in the courts above, occasioned either by the largeness of the penalties, or sometimes by the greatness of the offenders; as in cases of riots, forcible entries, deer stealing, and such like.

It remaineth, under this title, to insert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

County of } **B**E it remembred, that on the——day of——in the——
 Dublin. } year of the reign of——by the grace of God, of Great
 Britain, France, and Ireland, King, defender of the faith, and so forth, at
 ——in the county of——aforesaid, A. I. of——cometh before me
 J. P. esquire, one of the justices of our said lord the King, assigned to keep the
 peace of our said lord the King in the said county, and also to hear and deter-
 mine divers felonies, trespasses, and other misdemeanors in the said county com-
 mitted [residing near to the place where the offence herein after mentioned was
 committed; or as the statute requires] and giveth me the said justice to under-
 stand and be informed, that one A. O. of——in the said county, yeoman, on
 the——day of——now last past, at——in the said county, did [here set
 forth the fact, in the words of the statute as near as may be] against the
 form of the statute in such case made and provided: And afterwards, upon the
 aforesaid——day of——in the year aforesaid, at——aforesaid, in the
 county aforesaid, he the said A. O. after being duly summoned in this behalf
 before me the justice aforesaid appeareth and is present, in order to make his de-
 fence

fence against the said charge contained in the said information, and having heard the same, be the said A. O. is asked by me the said justice, if he can say any thing for himself, why he the said A. O. should not be convicted of the premisses above charged upon him in form aforesaid; who pleadeth that he is not guilty of the said offence. Nevertheless, on the day aforesaid, in the year aforesaid, at——aforesaid, in the county aforesaid, one credible witness, to wit, A. W. of——yeoman, cometh before me the justice aforesaid, and before me the same justice upon his oath on the Holy Gospel, to him then and there by me the said justice aforesaid administred, deposeth, sweareth, and on his oath, aforesaid affirmeth and saith, that the aforesaid A. O. on the——day of——aforesaid, in the year aforesaid, at——aforesaid, in the county aforesaid, did [here again set forth the fact, or so much thereof as is sufficient to convict the offender] And thereupon the aforesaid A. O. the——day of——aforesaid, in the year aforesaid, before me the justice aforesaid, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid is convicted; and for his offence aforesaid hath forfeited the sum of——of lawful money of Great Britain. to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice to this present record of the conviction as aforesaid, have set my hand and seal at——aforesaid, in the county aforesaid, the day and year first above-written.

If he confesses the fact then say,——And because the said A. O. hath nothing to say, nor can say any thing in his own defence touching and concerning the premisses aforesaid, but doth of his own accord freely and voluntarily acknowledge and confess all and singular the said premisses to be true, in manner and form as the same are charged upon him in the said information; and because all and singular the premisses being heard and fully understood by me the said justice, it manifestly appears to me——Or, if the party hath been summoned, and doth not appear, then say,——Whereupon, on the said——day of——in the year aforesaid, at——aforesaid, in the county aforesaid, be the said A. O. was duly summoned in this behalf, to appear before me, in order to make his defence against the said charge contained in the said information, but the said A. O. doth neglect to appear before me, and doth not appear, nor make any defence against the said charge as aforesaid: Therefore I the said justice, on the said——day of——in the year aforesaid, at——aforesaid, in the county aforesaid, do proceed to examine into the truth of the said complaint; And A. W. of——a credible witness, cometh before me the justice aforesaid, and before me the same justice upon his oath, &c.

Cometh before me] A conviction ought to be in the present tense, and not in the time past. *L. Raym.* 1376. *Str.* 608. *Robert's case.*

And giveth me to understand and be informed] A conviction ought to be on an information or complaint precedent. *M. 11 W. K. and Fuller, L. Raym.* 510.

That one A. O. of——in the said county, yeoman, &c.] All acts, which subject men to new and other trials, than those by which they ought to be tried by the common law, ought to be taken strictly; and the court of king's bench will require, that it do appear upon the face of such proceedings, that the fact was an offence within the act, and that the justices have proceeded

Conviction.

ceeded accordingly. *M. 1. An. K. and Chandler.* 1 Salk. 378. L. Raym. 581.

Therefore the particular manner of the offence ought to be set forth. Thus in the case of swearing, before the legislature by the act of the 19 G. 2. had directed a summary form of words for the conviction, it was required not only to set forth that the person had cursed or sworn in general, but the particular oaths and curses were to be set forth, that the court might judge thereupon, whether they were indeed oaths and curses or not. *H. 8 G. K. and Sparling.* Str. 497.

And in the case of *K. and Roberts*, *M. 11 G.* which was a conviction for swearing 150 oaths in these words *by God*, and cursing 150 curses in these words *God damn you*, this matter was carried so far, that it was insisted this was not sufficient, but that the oaths and curses ought to have been set forth 150 times each. But the oaths and curses being all only in the same words over again, the court held the conviction good. *Str. 608.* L. Raym. 1376.

And it seemeth, that a conviction on a penal statute ought expressly to shew, that the defendant is not within any of its provisoes; for since no plea can be admitted to such a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the court, that the defendant had no such matter in his favour, as the statute it self allows him to plead. *2 Haw. 250.*

But in the case of *K. and Ford*, *T. 9 G.* There was a conviction on the *3 C. c. 3.* for keeping an alehouse without licence; and it was objected, that in the act there is a proviso to exempt persons who have been punished by the former law of the *5 & 6 Ed. 6. c. 25.* and therefore it should have been said, he had not been proceeded against upon that act: But by the court, That coming in by way of proviso, he should have insisted on it in his defence; it appears he was asked what he had to say, and therefore we may reasonably presume he had no such defence to make. And the conviction was confirmed. *Str. 555.*

And in the case of *K. and Bryan*, *M. 12 G. 2.* The defendant was convicted on the gin act; and an exception was taken, that there was no averment, that it was not sold to be used in medicine: And the cases on the game act were mentioned, where in convictions it is necessary to exclude all the qualifications for killing game. On the other hand, it was insisted, that the reason of that was, because those were in the enacting clause, whereas this about medicine comes in by way of proviso, and is by way of defence to be shewn on the defendant's part: And for that purpose was cited, *M. 11 G. K. and Theed*; where in a conviction for obstructing an excise officer on the *8 An. c. 9.* it was objected, that it not being averred to be in the day, it should have been shewn that there was a constable present, which is made necessary in the night; but was held to be well, and its being in the night, should have been shewn on the defendant's part: And by the court, This is brought within the general enacting clause; and the true distinction is, where the extenuation comes in by way of proviso, or exception. And the conviction was confirmed. *Str. 1101.*

Being

Being duly summoned] T. 11 G. K. and *Venables*. The court were unanimously of opinion, that the party ought to be heard, and for that purpose ought to be summoned in fact; and that if the justices proceeded against a person without summoning him, it would be a misdemeanor in them, for which an information would lie. L. Raym. 1406.

And in the case of K. and *Allington*, H. 12 G. On affidavit that no summons was had, the court granted an information against the justice who made the conviction. Str. 678.

H. 6 G. K. and *Johnson*. The defendant was convicted for keeping a gun. And exception was taken, that there was not a *reasonable* summons; for it was made to appear the same day, which might be impossible upon account of the distance, or the summons being served late, and his witnesses might not be got together on so short a warning: then it was to appear *at the parish aforesaid*, whereas there were two parishes mentioned before; so the man might have gone to one, whilst they were convicting him at the other. It was answered, that the defendant appeared at the time, and made defence; so that cures all defects in the summons. And by the court, The answer is right. Str. 261.

H. 3 G. K. and *Simpson*. The defendant was convicted for deer stealing; and the conviction set forth, that he had been summoned to appear before the justices, but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this case, the justices should not have proceeded in the absence of the party, especially where it may end in a corporal punishment, as it may do here for want of a distress. And at another day, on consideration, Parker C. J. delivered the resolution of the court: We are all of opinion, the offender may be convicted, without appearing. The statute is silent as to the method of proceeding, and the law of England, it is true, in point of natural justice, always requires the party charged with any offence, to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default; were it otherwise, every criminal might avoid conviction. Str. 44.

But, generally, it is not necessary to *set forth the summons in the conviction*; for although no summons is set forth, yet the court will intend one: but where a summons is set forth, and that summons appears to be irregular, the court will quash the conviction, there being then no room to intend any other summons. 11 G. K. and *Venables*. Sess. C. V. 1. 210. L. Raym. 1405.

One credible witness, to wit, A. W. of—yeoman] It is requisite to name the witness, that it may appear he is not the same person who was the informer; for an informer who hath a share of the penalty, is never allowed to be a witness, unless in case where a statute shall specially so direct it.

On his oath aforesaid affirmeth and saith] In all convictions, being in the nature of judgments, the whole evidence ought to be set forth, or at least so much thereof as is sufficient to warrant the conviction; that the court of king's bench may judge of the sufficiency thereof: but otherwise it is in orders, which are authoritative. And so it was laid down in the case of K. and *Floyd*, M. 8 G. 2. which was thus; A motion was made to quash an order

Conviction.

of sessions, made under the statute of the 1 *W. c. 21. f. 6.* whereby the defendant was adjudged guilty *upon full proof* of the charge against him, and that he be discharged from his office of clerk of the peace, upon the objection that the evidence is not set out: but it was adjudged after consideration, that this was an order, and therefore the evidence needs not be shewn; but it that would be otherwise if it was a conviction. *Andr. 82. Str. 996.*

M. 5 G. 2. K. and Theed. A conviction on the candle act was quashed, because the evidence was not set out; it being only alledged, that the offence was *fully and duly proved.* *Str. 919. Andr. 84.*

T. 6 G. K. and Baker. A conviction for taking pilchards, against the form of the statute, quashed; because the witness swears generally that the defendant is *guilty of the premisses*, and that is taking upon himself to swear the law. *Str. 316.*

M. 11 W. K. and Fuller. A conviction ought to be certain, and not taken upon collection. *L. Raym. 510.*

And for his offence aforesaid hath forfeited] *H. 3 G. 2. K. and Hawks.* A conviction for killing a deer was quashed, because it was only—*he is convicted*, without any judgment of forfeiture. *Str. 858.*

To be distributed as the statute aforesaid doth direct] *M. 9 An. K. and Barret.* A conviction for deer stealing did set forth, that—*he is convicted, and shall forfeit 30l. according to the form of the statute*, without making a distribution, which ought to be 10l. to the informer, 10l. to the party grieved, and 10l. to the poor. But by the court, This is well enough; for by the statute he is only to forfeit in case he has goods, which is conditional, and not absolute. *1 Salk. 383.*

Note: On a suggestion that the defendant hath a title to the thing in question, a prohibition will be granted by the king's bench, before or after conviction, to stay the justice from proceeding; for without doubt if the defendant have but a colour of title, the justices have no jurisdiction in the cause, as where the defendant was convicted for cutting trees, where he had a right of common. *L. Raym. 901.*

Corn.

For the forestalling, ingrossing, or regrating of corn; see title **Forestalling.**

- I. *Selling corn by weight.*
- II. *Cutting corn growing.*
- III. *Leasing corn.*
- IV. *Burning corn in the straw.*
- V. *Exportation of corn.*
- VI. *Inland carriage of corn.*

I. *Selling corn by weight.*

Buying corn in the sheaf without measuring. 1. **T**O buy or sell corn in the sheaf, before it is threshed and measured, is against the common law of *England*; and the reason thereof seemeth to be, for that by such sale the market is in effect forestalled. *3 Inst. 197.*
By

By the act 11 Geo. 2. cap. 11. sect. 1. All wheat, rye, messin, pease, beans, barley, bere, oats, shillin, cutlins, meal, flour and malt, shall be fold and delivered by weight, and not by measure, or in any other manner. Corn, &c. to be fold by weight.

Such weight shall be according to the *avoirdupois* pound, fourteen pounds whereof shall make a stone, and eight stone one hundred weight, and twenty hundred one tun, to be standing weight, and all bargains made for felling such wheat, &c. by any other weight, or in any other manner than by weight, or for allowing any quantity of such wheat, &c. to the quantity agreed to be fold, or for making any addition or allowance to the stone, hundred, tun, or other weight shall be void. *sect. 2.* Avoirdupois pound.

If any person shall sell, barter, exchange or deliver any such wheat, &c. any other way than by weight and in the manner aforesaid, or if any persons, either by themselves or by any other person employed by them, shall, after the time aforesaid, enter into any agreement for buying or receiving any wheat, &c. any other way than by weight, and in the manner aforesaid, or shall demand, contract for, or receive any greater quantity thereof than the very quantity *bona fide* bought and agreed for, or shall demand or take any addition or allowance to the pound, stone, hundred, tun or other weight, over and above the real content thereof at standing weight, and every person buying any corn, grain, flour or meal, contrary to the directions aforesaid, shall forfeit five pounds, to be paid to such person, who within three callendar months after such offence committed, shall first give information thereof to any mayor or other chief magistrate of any city or town corporate, or any justice of the peace within their respective jurisdictions. Penalty for selling otherwise.

Who shall issue a summons under his hand, requiring the party accused to appear before him, at any reasonable time not less than twenty-four hours after the time he shall be served with such notice, and after the same shall be left at his usual place of abode, at which time such magistrate or justice shall by examination of one witness upon oath, proceed to hear and determine the same. Justices to hear offences.

But if any person shall think himself aggrieved by the judgment of such magistrate or justice, such person may appeal to the next going judges of assize, or if in the city or county of *Dublin*, to the justices of the next general sessions of the peace, who shall finally hear and determine the same. Appeal to the judges of assize.

And such magistrate or justice, or in case of appeal, such judges of assize, or justices at the sessions, shall issue a warrant under their respective hands and seals, directed to any constable of such county, city, or town corporate, requiring him to levy the sum adjudged to be forfeited, by distress and sale, of the offenders goods, rendering the overplus, if any be, to the owner, after deducting twelve pence *sterling* in the pound for his pains in levying the same. Warrant to levy penalties.

But if no goods shall be found to answer such sum, such offender shall be committed to the house of correction, and kept to hard labour during the space of three calendar months, unless he sooner pay the sum so adjudged to the party intitled to the same. Committal for want of distress.

To prevent persons who shall sell any of the said sorts of corn, grain, and malt, from spoiling and adulterating thereof by wetting it, or mixing any sand, gravel, dirt, or other kind of stuff, or from using any other fraud Adulterating corn, &c.

fraud or deceit to make such corn appear heavier than it would have been without such mixture, fraud, or deceit; every person being lawfully convicted of any frauds or deceits, to make such corn, grain, or malt appear heavier, by the oath of one credible witness, before any justice of the peace, shall for every such offence forfeit all such corn, and also the sum of twenty shillings, to be levied by distress and sale of such offenders goods; one moiety of which sum of twenty shillings shall be to the informer, and the other moiety thereof, together with all such forfeited corn, to the use of the poor of the parish where such offence shall have been committed.

Committal and
whipping.

And in case no such distress can be had, then every such offender shall, by warrant under the hand and seal of the said lord mayor, or any justice of the peace for the city of *Dublin*, or of any chief magistrate for any city, town, or corporation, or of any justice of the peace for any county where such offence shall have been committed, be sent to the house of correction, there to be whipped and kept to hard labour for any space of time not exceeding three weeks.

This act is made perpetual, by Stat. 1 Geo. 3. Cap. 17. Sect. 9.

II. Cutting corn growing, or setting fire to stacks of corn.

Cutting corn
growing.

1. Every person who shall unlawfully cut or take away any corn or grain growing, being convicted thereof by confession, or oath of one witness, before one justice, shall for the first offence pay such damages as the justice shall appoint: and if the justice shall think him not able or sufficient, or if he do not pay such damages, he shall commit him to the constable where the offence is committed, or where the party is apprehended, to be whipped; and for every other offence he shall in like manner be whipped. The constable refusing, shall be committed by the justice, till he conform.
10 C. ff. 2. c. 23.

But if he cut it at one time, and then come again at another time and take it away, it is felony. 1 *Haw.* 93.

Setting fire to
corn.

2. By the act 29 *Geo.* 2. c. 12. *sect.* 3. If any person shall wilfully or maliciously set fire to any stack, or rick of corn, although the same be not burned; or shall be procuring, aiding, or assisting in any of the said offences; every person so offending, being lawfully convicted, shall be adjudged guilty of felony without benefit of clergy.

Barony to make
satisfaction.

3. The inhabitants of every barony, as well protestants as papists, shall make full satisfaction to every person, their executors and administrators, for the damage which they shall have sustained by setting fire to any stack or rick of corn, which shall be committed in that barony.

III. Leazing of corn.

Leazing in har-
vest-time.

1. By the act, 25 *Hen.* 8. c. 1. No persons being strong of body to labour for their living shall gather or lease in any place in harvest time except it be in their own fields, and no impotent persons shall gather or lease in any place saving in the same paroch where their dwelling is, and no man shall give ne take any corn in harvest for ripping ne binding of corn.

2. And

2. And if any persons gather, lease, or take any corn for their labour contrary to this act, it *shall* be lawful to every person or persons to take from every such gatherer, leaser, and other such persons as shall take corn for their labour in manner aforesaid, all such corn as they take or get by leasing as is aforesaid, with all such other stole corn as shall be gotten with them as well within their houses as without, the one half thereof to the lord of the soil where the same shall be found, and the other half to the taker of the same. Taking corn for labour.

3. And by the act, 28 Hen. 8. c. 24. Every person who shall lease in the harvest time in any field as long as the corn shall be there in reak or otherwise, shall not only lose all the corn that they shall lease to any person that will take or seize the same, but also shall forfeit for every time that they shall so lease twelve pence, which forfeiture shall be to the lord of the soil, and to be presented and inquired of in the said lord's court, and if he have no court, then the said forfeiture to be to the King. Penalty for leasing.

And all his justices in every of his courts to inquire thereof in like form, as they do all other estatutes penal, and to see the same duly punished and put in execution.

4. Every occupier of such fields wherein any corn shall be, which willingly shall permit any such persons to lease contrary to the form aforesaid, shall forfeit to the King for every time so offending twelve pence, of which offences the King's justices shall inquire and execute in manner aforesaid. *f. 2.* Permitting to lease.

5. Every person which in the harvest season receive or keep in their habitations any ymnakes which shall lease contrary to this act, shall forfeit for every such ymnake six shillings eight pence, which forfeiture shall be to the lord of the soil, if it be inquired or presented in his court or leet, and in default thereof to be inquired and presented in the King's court in manner aforesaid. *f. 3.* Keeping leasers.

6. Provided that this act ne any thing therein contained shall extend to any owners of corns, but that they may lease by themselves or servants their own corn. *f. 5.*

IV. Burning corn in the straw.

1. By the act, 10 & 11 Car. 1. c. 17. *sect. 1.* No person shall by himself, wife, children, servants, tenants, or any of them burn corn or grain in the straw, upon pain of imprisonment in the common gaol of the county wherein the offence shall be committed for ten days without bail or mainprize for the first offence, and the delinquent to pay the charge of sending them to the gaol before they be thence enlarged. Offenders to be imprisoned.

And for the second offence to be imprisoned one whole month without bail or mainprize, and to pay the charges as aforesaid, and for the third offence to forfeit forty shillings, and to be bound unto the good behaviour and to pay the charges as aforesaid. Penalties.

* The

To relief of
Prisoners.

2. The said forty shillings to be paid towards the relief of the prisoners in the said gaol, and to be paid unto the chief magistrate of the place where such gaol shall be, before the offender be discharged, and at his discretion to be distributed.

Inquiry of Of-
fences.

3. And it shall be lawful for the justices of peace of the county where such offences shall be committed in their sessions of the peace, to inquire and determine of all offences against this act, and at all times out of the sessions, as well by oath as all other lawful means to try and find out the said offences, and to commit the offenders according to this act.

V. Exportation of corn.

Premium for
exporting corn.

1. By the act, 29 Geo. 2. c. 9. sect. 1. When malt, bere, or barley, shall not exceed the price of twelve shillings the quarter, rye the price of fourteen shillings the quarter, wheat the price of twenty four shillings the quarter, and oats the price of six shillings the quarter; every person, who shall put on ship-board in *British* or *Irish* shipping, the master and two thirds of the mariners at least being his Majesty's subjects, any of the said sorts of corn and malt, in any port within this kingdom, where the rates shall not be higher than as before mentioned, with intent to export the same, shall receive from the officer of such port respectively, instead of the allowances to be made by virtue of an act 6 Ann. c. 18. for encouraging the exportation of corn, the præmiums following, and no more (that is to say) for every quarter of bere, barley, or malt, ground or unground, one shilling and six pence; for every quarter of rye, ground or unground, one shilling and six pence; for every quarter of wheat, ground or unground, two shillings; for every quarter of oats, ground or unground, one shilling.

Provided, that every quarter of barley and bere, shall contain twenty four stone, every quarter of malt twenty stone, every quarter of oats twenty two stone, and every quarter of wheat and rye, forty stone.

Grand jury to
enquire the
prices.

2. The grand jury of every county, at every general quarter sessions, shall enquire upon oath, and present the true rates and prices respectively, of all the said sorts of corn and malt within the several counties, at the times of such quarter sessions.

Which presentment being confirmed by the justices of the peace, in open sessions, is to continue and be deemed as the estimate and value of such corn and malt, in receiving the duty and paying the præmiums on exportation, until the next general quarter sessions.

3. Where any the said ports shall be in counties of cities, or counties of towns, it shall be lawful for every person to export thence in manner aforesaid, the said corn, malt, meal, and flour, at the prices ascertained by the grand juries of the counties of cities and counties of towns respectively.

Clerks of the
peace to re-
turn present-
ments.

4. Provided the clerks of the peace of the said counties respectively, where such presentments shall be made and confirmed, do, in fourteen days after confirming thereof, transmit to the commissioners of his Majesty's revenue in *Dublin*, true and exact copies, under their hands and seals respectively, of such presentments, from time to time.

5. And

5. And if any clerk of the peace shall neglect so to do, he shall forfeit to his Majesty, &c. for every such neglect, twenty pounds, being thereof convicted by indictment at the assizes in the county where he was clerk of the peace, at the time of confirming such presentments.

VI. *Inland-carriage of corn.*

1. By the act, 31 Geo. 2. c. 3. sect. 1. Every person who shall bring ^{Bringing corn to Dublin.} found, clean, well-saved merchantable corn, wheat, rye, messlin, bere, barley, malt, oats, flour, or meal, by land-carriage, to *Dublin*, from any place where the same grew, or was made, within this kingdom, which is at a greater distance from *Dublin* than ten miles *Irish* plantation-measure, and shall sell the same in any of the publick markets, where corn is usually sold in the city of *Dublin*, the liberties of Saint Sepulchres, *Thomas-Court*, and *Donore*, shall, upon performing the several requisites herein after mentioned, receive from the collector of the port of *Dublin*, for every forty stone weight of such corn, &c. and so in a rateable proportion for any greater quantity which they shall so bring from any place, at any greater distance from said city than ten miles *Irish* plantation measure, and shall sell the same as aforesaid, the several sums herein after specified, in proportion to the respective distances of the places from whence the same shall be so brought, that is to say, for every five miles *Irish* plantation measure such place shall be distant from *Dublin*, over and above ten miles *Irish* plantation measure, five pence.

Provided that no person shall be intitled to receive more for the carriage of forty stone weight of such corn, &c. so brought to *Dublin*, and sold as aforesaid, than ten shillings.

2. And by the act, 33 Geo. 2. c. 12. s. 1. No person shall be intitled to receive any of the sums in the act 31 Geo. 2. c. 3. or herein mentioned, unless they shall perform the several requisites herein after mentioned, instead of those prescribed by the said former act; that is to say, unless they shall first deliver to the officer herein after mentioned, within the space of three months after such corn, meal, or flour has been so sold, an affidavit made by the owner of the corn, wheat, rye, messlin, bear, barley, malt, oats, flour, or meal, or some person employed by him to take care of the same, sworn before some justice of the peace of the county from whence such corn, &c. flour, or meal shall have been brought. ^{Requisites to be performed.}

3. Which affidavit every such justice is required to take without fee, ^{Affidavit to be made.} and shall contain the quantity and quality of such corn, &c. the name of the place where the same grew, or was made, and the number of *Irish* plantation miles such place is distant from *Dublin*, to be each expressed in words, and not in figures.

4. And shall also deliver to the said officer a certificate under the hand and seal of one justice of the peace for such county, containing the several particulars herein before directed to be mentioned in such affidavit, as is herein before required to be made, and shall also prove, by one creditable witness upon oath, which oath the said officer, or person appointed as herein after mentioned, is impowered to administer, that such certificate was signed and sealed by the person whose name is subscribed thereto. ^{Certificate of a justice.}

And

And such person shall also swear before the said officer, that such corn, &c. flour, or meal, has been sold in some one of the publick markets or places where corn is usually sold in the city of *Dublin*, the liberties of *St. Sepulchre's*, *Thomas-court*, or *Donore*, and that he, or any other person to his belief, has not received any præmium for the same.

And shall also deliver to such officer a note from the craner of such market where the same has been so sold (which note such craner is hereby required to give without fee) containing the quantity and quality of such corn, &c. which has been sold, and the day of the month and year on which the same has been so sold.

Provided that the carrier of such corn, &c. shall make an affidavit before such officer (which affidavit such officer is required to take) in which he shall mention the names of the persons the same belong to, the quantity and quality thereof, and the place from whence he brought the same. *f. 2.*

In case any craner shall refuse to give such note as is herein before directed, to such persons as shall be intitled to the same, such craner shall forfeit for every such offence, to the person whom he shall so refuse, forty shillings, to be recovered by him by civil bill before the recorder of *Dublin*. *f. 3.*

And if such craner shall give a false note, he shall forfeit for every such offence, ten pounds, to be recovered in like manner by such person as shall sue for the same.

If the person who shall make any such affidavit be illiterate, it shall be made appear, upon oath, to the person who shall take such affidavit, that the same was truly read to the person offering to make such affidavit, before he shall be permitted to make the same. *f. 4.*

If any person shall forge any certificate, affidavit, or note, or shall produce to such officer or person appointed as is herein after mentioned any such, knowing the same to be forged, or shall knowingly swear any thing that is false in any such affidavit, they shall, upon conviction, suffer such punishment, as persons convicted of wilful and corrupt perjury are by law subject to. *f. 5.*

If any justice of the peace shall sign any blank certificate, knowing the same to be false, and shall be thereof convicted, upon any information to be filed in his Majesty's court of *King's-bench* in *Dublin*, such justice shall for ever after be disabled from acting as a justice of the peace. *f. 6.*

Every person who shall be intitled to receive any of the sums mentioned in the said former act, for bringing malt or flour or wheat to *Dublin*, shall receive, over and above the sums therein mentioned, for every five miles the same shall be so brought above ten miles, the following sums, (that is to say) for every forty stone weight of malt, five pence, and for every hundred weight of flour or wheat, one hundred and twelve pounds to be computed to the hundred, two pence half penny. *f. 20.*

Corn.

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3 Geo. 3. Cap. 9. Sect. 1. *Whereas some doubts has arisen upon the construction of the acts, 31 Geo. 2. c. 3. and 33 Geo. 2. c. 12. whether any person can be intitled to a præmium for bringing corn or flour to the city of Dublin, where the place from whence the same is brought is not full five miles distant from the city of Dublin, over and above ten miles; and also whether pearl barley be intitled to any præmium under the said acts; for the removing of which doubts, every person intitled to receive any of the præmiums given by the said acts, shall receive the same proportionably according to the number of miles the place from whence the corn or flour shall be brought, shall be distant from the city of Dublin, over and above ten miles, and the persons who bring pearl barley to the city of Dublin, shall be intitled to the like præmium, as for malt, upon performing the several requisites in the said act mentioned.*

Doubts on the acts, 31 and 33 Geo. 2.

Proportionable præmium.

Præmium for pearl barley.

No person shall be intitled to receive any præmium granted by this or the former acts for bringing of corn, flour, malt, or pearl barley to *Dublin*, unless the owner thereof, or some person employed by him or her to take care of the same where it grew or was made, do, before the same is brought to *Dublin*, make such affidavit before a justice of the peace of the county from whence it is to be brought, and obtain such certificate as is required by the former acts, and shall swear before such justice, that neither he, nor any other person to his belief, has received any præmium for the same, or made any affidavit but the present, to intitle him to a præmium to the same.

Affidavit by owner,

County from whence brought, Tenor of the oath.

Coroner.

CORONERS are ancient officers by the common law, so called because they deal principally with the pleas of the crown, and were of old time the principal conservators of the peace. 2 *Haw.* 42.

Concerning whom I shall shew,

- I. *Who may be a coroner.*
- II. *How chosen.*
- III. *His power and duty in taking an inquisition of death.*
- IV. *His power and duty in other matters.*
- V. *His fees.*
- VI. *Punishment for not doing his duty.*

I. *Who may be a coroner.*

1. Of ancient time this office was of great estimation; for none could have it under the degree of a knight. 3 *Ed.* 1. c. 10. 4 *Inst.* 271.
2. And by the 14 *Ed.* 3. st. 1. c. 8. No coroner shall be chosen unless he have land in fee, sufficient in the same county whereof he may answer to all manner of people.

Dignity.

Estate.

B b

II. *How*

II. How chosen.

To be chosen
in the county
court.

1. The coroner (as of ancient time the sheriffs and conservators of the peace) shall be chosen in full county, that is, in the county court, by the commons of the same county. 28 *Ed.* 3. c. 6.

And this must be in pursuance of the king's writ for that purpose, issuing out of, and returnable into the chancery; and none but freeholders have a voice at such election, for they only are suitors to the county court. 2 *Haw.* 43, 44.

County to answer for him.

2. And being elected by the county, if he be insufficient, and not able to answer such fines and other duties in respect of his office, as he ought; the county, as his superior, shall answer for him. 2 *Inst.* 175.

Office not void
by the king's
death.

3. And being chosen by the county, his office continues, notwithstanding the demise of the king. 4 *Inst.* 271.

To be sworn.

4. And after he is chosen, he shall be sworn, by the sheriff, for the due execution of his office. 2 *Hale's H.* 55.

Others not
chosen by the
county.

5. But in the statute of 28 *Ed.* 3. which enacts that they shall be chosen by the county, there is a saving to the king and other lords, who ought to make coroners, their franchises.

Chief justice.

6. The lord chief justice of the king's bench, by virtue of his office, is the chief coroner of *England*. 2 *H. H.* 53.

III. His power and duty in taking an inquisition of death.

Notice.

1. When it happens that any person comes to an unnatural death, the township shall give notice thereof to the Coroner. Otherwise if the body be interred before he come, the township shall be amerced. *Hale's Pl.* 170.

Burying without notice.

2. And by *Holt Ch. J.* It is a matter indictable to bury a man that dies a violent death, before the coroner's inquest hath sat upon him. 2 *Haw. Not.* 8.

Lying unburied.

3. And if the township shall suffer the body to lie till putrefaction, without sending for him, they shall be amerced. *Hale's Pl.* 270. 2 *Haw.* 48.

Precept to
summon a jury.

4. When notice is given to the coroner, he is to issue a precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men of their townships, to appear before him in such a place, to make an inquisition touching that matter. 4. *Ed.* 1. 2 *H. H.* 59. Or he may send his precept to the constable of the hundred. *Wood b.* 4. c. 1.

But the aforesaid statute being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty not mentioned in it, which was incident to his office before: Upon which ground, it hath been holden, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent

adjacent towns; but that it is sufficient to say, that it was taken by the oaths of lawful persons of the county; inasmuch as such inquisitions, being good before the statute, which is wholly declaratory, must needs be so still. But it seems that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn.

2 *Haw.* 47.

5. These are to be at least 12; and it is said, that all persons of the Jury. neighbouring towns, above the age of 12 years, are bound to attend at the taking the inquisition, unless they have a reasonable excuse to the contrary.

2 *Inst.* 148. 2 *Haw.* 54.

6. If the constables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the constables or jurors in default shall be amerced before the judges of assize. Default in not appearing.

2 *H. H.* 59.

7. The jury appearing is to be sworn and charged by the coroner to enquire, upon the view of the body, how the party came by his death. Swearing and charge.

2 *H. H.* 60.

8. For he can take indictments of death, only upon view of the body, and not otherwise, therefore if the body be interred before he come, he must dig it up. View of the body. And this he may do lawfully within any convenient time, as in 14 days. *Hale's Pl.* 170. 2 *Haw.* 48.

9. If the body cannot be viewed, the coroner can do nothing; but the justices of the peace shall inquire thereof. *Hale's Pl.* 170. 2 *Haw.* 48. Where the body cannot be viewed.

10. The jury being sworn, and the body upon view, he shall enquire upon the oaths of them, in this manner, by the statute of 4 *Ed.* 1. *st.* 2. Form of the charge, where a person is slain. called the statute *de officio coronatoris*; viz.

If they know where the person was slain; whether it were in any house, field, bed, tavern, or company:

Who are culpable, either of the act, or of the force; and who were present, either men or women, and of what age soever they be, if they can speak, or have any discretion:

And how many soever be found culpable, they shall be taken and delivered to the sheriff, and shall be committed to the gaol;

And such as be found, and be not culpable, shall be attached until the coming of the judges of assize.

11. And, by the same statute, if it fortune any such man be slain, which is found in the fields, or in the woods. first it is to be enquired, whether he were slain in the same place or not: Where a person slain is found in the fields or woods.

And if he were brought and laid there, they shall do so much as they can to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart:

It shall be also enquired, if the dead person were known, or else a stranger, and where he lay the night before.

12. Also, by the same statute, all wounds ought to be viewed, the length, breadth, and deepness; and with what weapons; and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be; and who gave the wound. Wounds.

Defendant's
evidence.

13. And they must hear evidence on all hands; if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office. 2 *H. H.* 157.

To inquire of
the murderer's
lands and
goods.

14. And by the aforesaid statute, if they be found culpable of the murder, the coroner shall immediately go to his house, and shall enquire what goods he hath, and what corn he hath in his graunge; and if he be a freeman, they shall inquire how much land he hath, and what it is worth yearly, and further, what corn he hath upon the ground: and likewise of his freehold, how much it is worth yearly, over and above the service due to the lord of the fee; and the land shall remain in the king's hands, until the lords of the fee have made fine for it:

And when they have thus enquired upon every thing, they shall cause all the land, corn, and goods to be valued, in like manner as if they should be sold immediately; and thereupon they shall be delivered to the whole township, which shall be answerable before the judges for all.

Persons
drowned or
suddenly dead.

15. In like manner, by the said statute, it is to be inquired of them that be drowned, or suddenly dead, whether they were so drowned, or slain, or strangled by the sign of a cord tied streight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not slain, then ought the coroner to attach the finders, and all other in the company.

Flight.

16. He shall also enquire, whether the persons found guilty, fled; for which flight they forfeit goods and chattels. 2 *Haw.* 48, 53.

And it hath been formerly held, that if a person were slain, and upon the coroner's inquest on view of the body, it were found that such a person fled, tho' the said person were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inquest is so solemn, that it is not traversable; also when the goods are once lawfully vested in the king, by that inquest the property of them cannot be devested. But this opinion seemeth harsh and unreasonable, that a man shall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inquest taken in his absence, without either hearing him, or giving him an opportunity of defending himself. 1 *Bac. Abr. Coroner. D.* 2 *Haw.* 54.

Also it is strongly holden in some books, that an inquest of self murder, found before a coroner, cannot be traversed; but the contrary opinion being also holden by books of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest by being removed into the king's bench by certiorari, may be there traversed by the executor or administrator of the person deceased; or in case the coroner's inquest find him to have been a lunatick, by the king or the lord of the manor. 1 *Bac. Abr. Coron. D.* 2 *Haw.* 54.

Township a-
merced for an
escape.
Deodands.

17. And if any person be slain or murdered in the day time, and the murderer escape untaken, the township shall be amerced. 3 *H.* 7. c. 1.

18. Concerning horses, boats, carts, and the like, whereby any are slain, which properly are called deodands, they also shall be valued, and delivered unto the towns as before. 4 *Ed.* 1. *st.* 2.

Coroner's
rolls.

19. All which things must be inrolled in the rolls of the coroners. 4 *Ed.* 1. *st.* 2.

20. And

20. And the sheriffs shall have counter rolls with the coroner, of things Sheriff's rolls. belonging to the office. 3 *Ed.* 1. c. 10.

21. But it is not necessary that the inquisition be taken in the very same Adjourning after view. place where the body was viewed; but they may adjourn to a place more convenient. 2 *Haw.* 48.

22. Immediately upon these things being inquired, the bodies of such Burial. persons being dead, or slain, shall be buried. 4 *Ed.* 1. st. 2.

23. By the 10 *Car.* 1. sess. 2. c. 13. Every coroner, upon any inquisition before him found, whereby any person shall be indicted for murder Certifying to the assizes. or manslaughter, or as accessory before the offence committed, shall put in writing the effect of the evidence given to the jury before him, being material; and shall bind over the witnesses to the next general gaol delivery to give evidence; and shall certify the evidence, the recognizance, and the inquisition or indictment before him taken and found, at or before the trial, on pain of being fined by the court.

By the express words of which statute, he may enquire of *accessaries before the fact*; but he cannot enquire of accessaries *after* the fact. 2 *Haw.* 48.

24. He ought also to enquire of the death of all persons who die in prison; that it may be known, whether they died by violence, or any unreasonable hardships: for if a prisoner by the dures of the gaoler, comes to an untimely death, it is murder in the gaoler, and the law implies malice in respect of the cruelty. 3 *Inst.* 52. 91. Persons dying in gaol.

And this inquest upon prisoners ought to consist of a party jury, that is, six of the prisoners, and six of the next vill or parish, not prisoners. *Umfreavill's Coroner.* 212.

25. If the inquisition shall be quashed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquisition. *E. 5 G. K. and Saunders.* Str. 167. *M. 9 G.* Case of the coroner of *Wenlock.* Str. 533. Inquisition quashed.

And if a coroner appear to have been corrupt in taking an inquest, it seems that a *melius inquirendum* shall go to special commissioners, who shall proceed not on view, but upon testimony; and the coroner shall have nothing to do with such inquest: but where the inquest is quashed for want of form only, he shall take a new one in like manner, as if he had taken none before. 1 *Bac. Abr.* Coron. D.

IV. His power and duty in other matters.

1. He ought to inquire of treasure that is found; who were the finders, Treasure and likewise who is suspected thereof; and that may well be perceived, trove. where one liveth riotously, haunting taverns, and hath done so of long time: hereupon he may be attached for this suspicion, by four, or six, or more pledges, if he may be found. 4 *Ed.* 1. st. 2.

2. Besides his judicial place, he hath also an authority ministerial as a Executing process. sheriff; namely, when there is just exception taken to the sheriff, judicial process shall be awarded to the coroner, for the execution of the king's writs: and in some special cases, the king's original writ shall be immediately directed to him. 4 *Inst.* 271.

3. He

Outlawry.

3. He is bound to present in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood b. 4. c. 1.*

Appeals, abjuration.

4. He had antiently also a power in certain appeals, as of rape, and maim; and also in cases of abjuration for felony or other offences; which are now out of use.

V. His fees.

Fee of 13s. 4d.

1. By the statute of 3 H. 7. c. 1. The coroner shall have for his fee, upon every inquisition taken upon the view of the body slain, 13 s. 4 d. of the goods and chattels of him that is the slayer and murderer, if he have any goods; and if not, he shall have for his said fee, of such amerciaments as shall fortune any township to be amerced for escape of such murderer.

VI. His punishment for not doing his duty.

His punishment for neglect of duty.

1. Coroners concealing felonies, or not doing their duty thro' favour to the misdoers, shall be imprisoned a year, and fined at the king's pleasure. 3 Ed. 1. c. 9.

2. And by the 3 H. 7. c. 1. If any coroner be remiss, and make not inquisitions upon the view of the body dead, and certify the same to the gaol delivery, he shall forfeit to the king an hundred shillings.

4. And he ought to execute his office in person, and not by deputy; for he is a judicial officer. *Wood b. 4. c. 1.* Otherwise it seemeth that he shall incur the afore said penalties, for remissness or neglect of duty.

The coroner's precept to summon a jury.

County of Dublin. { To the high constable of _____ in the
said county.

THESE are in the name of our sovereign lord the king, to require you, immediately upon sight hereof, to summon and warn 24 good and lawful men of the four next townships to _____ in the said county, to be and appear before me A. C. gentleman, one of the coroners of the county aforesaid, at _____ aforesaid in the said county, on the _____ day of _____ then and there to inquire of, do, and execute all such things as on his majesty's behalf shall be lawfully given them in charge, touching the death of A. D. And be you then there to certify what you shall have done in the premisses, and further to do and execute what in behalf of our said lord the king shall be then and there enjoined you. Given under my hand and seal the _____ day of _____

The

The jurors oath on the coroner's inquest.

YOU shall diligently inquire, and true presentment make, on the behalf of our sovereign lord the king, how and in what manner A. D. (or, a person unknown, as the case is) here lying dead, came to his death; and of such other matters relating to the same as shall be lawfully required of you, according to your evidence: So help you God.

After the foreman is sworn, the rest may be sworn, three or four together, as follows:

Such oath as A. F. the foreman of this inquest hath for his part taken, you and every of you shall well and truly observe and keep on your parts respectively: So help you God.

Witnesses oath.

THE evidence which you shall give to this inquest, on the behalf of our sovereign lord the king, touching the death of A. D. shall be the truth, the whole truth, and nothing but the truth: So help you God.

Inquisition of murder

County of Dublin. **A**N inquisition indented, taken at _____ in the county of _____ aforesaid, the _____ day of _____ in the _____ year of the reign of _____ before me A. C. gentleman, one of the coroners of our lord the king, for the county aforesaid, upon the view of the body of A. D. then and there lying dead, upon the oaths of A. B. C. D. E. F. &c. good and lawful men of _____ aforesaid, and of three other of the next towns, to wit, K. L. and M. in the said county, who being sworn and charged to inquire on the part of our said lord the king, when, where, how, and after what manner, the said A. D. came to his death, doth say, upon their oath, that one A. M. late of _____ aforesaid, gentleman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the _____ day of _____ in the _____ year of _____ aforesaid, at the first hour in the night of the same day, with force and arms, at _____ in the county aforesaid, in and upon the aforesaid A. D. then and there being in the peace of God and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault; and that the aforesaid A. M. then and there with a certain sword made of iron and steel, of the value of 5s. which he the said A. M. then and there held in his right hand, the aforesaid A. D. in and upon the left part of the belly of the said A. D. a little above the navel of the said A. D. then and there violently, feloniously, voluntarily, and of his malice forethought, struck and pierced, and gave to the said A. D. then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D. a little above the navel of the said A. D. one mortal wound of the breadth of half an inch, and of the

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the depth of three inches, of which said mortal wound the aforesaid A. D. then and there instantly died; and so the said A. M. then and there feloniously killed and murdered the said A. D. against the peace of our said lord the king, his crown and dignity.

And the said jurors further say, upon their oath aforesaid, that A. A. of ——— yeoman, and B. A. of ——— yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid in form aforesaid committed, that is to say, on the said ——— day of ——— in the ——— year aforesaid, at ——— aforesaid, in the county aforesaid, at the first hour in the night of the said day, then and there comforting, abetting, and aiding the said A. M. to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of our said lord the king, his crown and dignity.

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. and B. A. had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or, And the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels contained in the inventory to this inquisition annexed, which remain in the custody of B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. C. Coroner.

A. B.

C. D.

E. F. &c. jurors.

An inquisition where one hangs himself.

———As above to———not having God before his eyes, but being seduced and moved by the instigation of the devil, at———aforesaid, in a certain wood at———aforesaid standing and being, the said A. D. being then and there alone, with a certain hempen cord of the value of 3d. which he then and there had and held in his hands, and one end thereof then and there put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice forethought, hanged and suffocated; and so the jurors aforesaid, upon their oath aforesaid say, that the said A. D. then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice forethought, himself killed, strangled, and murdered, against the peace, &c.

An inquisition where one drowns himself.

———at———aforesaid, in the county aforesaid, then and there being alone, in a common river there, called———himself voluntarily and feloniously drowned; And so the jurors aforesaid, upon their oath aforesaid say, that

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that the aforesaid A. D. in manner and form aforesaid, then and there himself voluntarily and feloniously as a felon of himself killed and murdered; against the peace——.

An inquisition where one dies a natural death.

——— that the said A. D. on the —— day of —— in the year aforesaid, at the parish and in the county aforesaid, to wit, in a certain place called ——, was found dead; that he had no marks of violence appearing on his body, and died by the visitation of God, in a natural way, and not otherwise. In witness, &c.

An inquisition upon one who dies in gaol.

——— who say upon their oath, that the aforesaid A. D. on the day of the taking of this inquisition, being a prisoner in the gaol at —— in the county aforesaid, then and there died of the visitation of God, and then and there in manner and form aforesaid came to his death, and not otherwise. In witness, &c.

An inquisition on one non compos mentis.

——— who say upon their oath, that the aforesaid A. D. on the day and year aforesaid, and at the time of his death, to wit, from the —— day of —— to the time of his death, and at the time of his death aforesaid, was a lunatick, and a person of insane mind; and that the said A. D. being a lunatick and a person of insane mind as aforesaid, did on the —— day of —— come alone to a certain river called —— in the said county, and did then and there cast himself into the said river, and drowned himself in the water of the said river. And so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid A. D. from the cause aforesaid, in manner and form aforesaid, came to his death, and not otherwise. In witness, &c.

An inquisition on one for cutting his throat.

——— by the instigation of the devil, at —— aforesaid in the county aforesaid, in and upon himself, then and there being in the peace of God and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault: and that the aforesaid A. D. then and there with a certain knife, of the value of one penny, which he the said A. D. then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought, did strike, and gave to himself then and there with the knife aforesaid, upon his throat aforesaid one mortal wound of the breadth of four inches, and the depth of one inch, of which said mortal wound the said A. D. at —— aforesaid, in the county aforesaid, languished, and languishing lived, from the said —— day of —— in the —— year aforesaid, to the —— day of —— and that the said A. D. on the

Coroner.

the—day of—aforsaid, in the—year aforsaid, at—aforsaid, in the county aforsaid, of that mortal wound died. And so the jurors aforsaid, &c.

For killing another in his own defence.

—upon their oaths say, that A. K. late of—gentleman, at—aforsaid in the said county, on the—day of—in the—year of—in the peace of God and of our said lord the king then being, A. M. late of—in the county of—at the hour of—in the afternoon of the same day, did come, and upon him the said A. K. then and there of his malice forethought did make an assault, and him the said A. K. did then and there endeavour to beat and kill, by continuing the assault aforsaid, from the house of one W. H. in—aforsaid, to a certain place called—in the county aforsaid, and the said A. K. seeing that the said A. M. was so maliciously disposed, to a certain wall in the said place, called—did flee, and from thence for fear of death could not escape, and so the said A. K. himself, in preservation of his life, against the said A. M. continued to defend, and in his own defence him the said A. M. upon the right part of the breast of him the said A. M. with a certain sword of the price of one shilling, which the said A. K. then and there held in his right hand, did strike, then and there giving to the same A. M. one mortal wound, of the breadth of one inch, and of the depth of three inches, of which said mortal wound the said A. M. at—aforsaid in the county aforsaid, languished, and languishing lived from the said—day of—to the—day of—from thence next ensuing, and that the said A. M. on the said—day of—in the—year aforsaid, at—aforsaid in the said county, of that mortal wound died: And so the said A. K. did then and there kill him the said A. M. in his own defence.

An inquisition where the murderer is unknown.

—The same as before, only say,—that a certain person unknown, &c. and add—And the said jurors upon their oath aforsaid further say, that the said person unknown, after he had committed the said felony and murder in manner aforsaid, did fly away: Against the peace, &c.

County court.

County.

i. **A**Nciently, the comites, counts, or earls, had the government of the counties; and afterwards the vicecomites or sheriffs. And the county seemeth to be nothing else, but the district of the comes or count. Shire is a Saxon word, from scyran, to share or divide, for that the shires or counties are divided by certain metes and bounds from each other. And the sheriff, in Saxon scyregerefa, is the reve, grave, or governor of the shire; wherein he hath great power, being therein the chief officer under the king.

County court.

2. The sheriff holdeth in his county two courts; the torn, and the county court: The torn is the king's court of record for criminal causes, and for redref-

County court.

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redressing of common grievances within the county; the *county court* is not a court of record, but only a court baron, for civil causes, and this is the court of the sheriff himself.

3. By the 2 & 3 *Ed. 6. c. 25.* No county court shall be longer deferred than one month from court to court, so that the county court shall be kept every month, and not otherwise. When to be holden.

And this is to be accounted 28 days to the month, and not according to the month of the kalendar. *2 Inst. 71.*

4. It may be kept at any place within the county, unless restrained by statute. *Wood b. 4. c. 1.* Where to be kept.

5. The suitors, that is, the freeholders, are the judges in this court; except that in re-disseisin, by the statute of *Merton*, the sheriff is judge. And by the statutes concerning parliamentary elections, he is judge at the election of knights; for he must make a true return at his peril. *Barl. County Court.* How far the sheriff is judge.

6. This court shall hold pleas betwixt party and party, where the debt or damage is under 40*s.* *4 Inst. 266.* Of what sum this court hath cognizance.

But in a *replevin*, the sum may be above 40*s.* *4 Inst. 266.*

7. Also it hath not cognizance of trespass *vi & armis*, because a fine is thereby due to the king, which it cannot impose. *4 Inst. 266.* Of what offences this court hath cognizance.

8. And by the 11 *H. 7. c. 15.* No plaint shall be entred in the county court, but where the plaintiff or his attorney is present; and the plaintiff shall find pledges to pursue his plaint; and he shall have but one plaint for one trespass or contract; on pain of 40*s.* half to the king, and half to the prosecutor. And one justice may examine the sheriff or other officer, making default; and shall, within a quarter of a year, certify the examination into the exchequer. One plaint for one trespass or contract.

But as to the pledges above-mentioned, they are now disused in this court; and were formerly used only in cases where the plaintiff lived out of the county. *Greenw. 11. Read. County C.*

9. But by virtue of a writ of *justicies*, the court may hold plea of trespass *vi & armis*, and of any sum, or of all actions personal above 40*s.* For this writ is in the nature of a commission to the sheriff, and is *vicontiel*, that is, belongs to the sheriff, and is triable in the county court, and is not returnable. *4 Inst. 266.* Writ of justicies.

10. The plaintiff in this court first takes out a summons, returnable at the next county court; and if the defendant do not appear, an attachment or *distringas* is to be made out; but if the defendant appears, the plaintiff is to file his declaration, shewing his cause of action, or matter of complaint, in what manner the action accrued, at what time and place the wrong was done, and the damage he hath sustained. *Greenw. 11. Read. County C.* Summons.

11. If the defendant doth appear, and the next court after gives a rule to declare, and the plaintiff doth not file his declaration within the time, he may be nonsuited. *id.* Declaration.

12. When the plaintiff hath declared, he must continue his suit from court day to court day, otherwise the defendant may take advantage of it; and this is called a continuance, being an adjourning of the suit from time to time, to keep it on foot. *id.* Continuance.

13. The rule, or *dies datus*, is when farther day is given to the plaintiff Dies datus.

County court.

to declare, or to the defendant to plead; and the time given is usually to the next court day, but upon occasion may be enlarged. *id.*

Answer.

14. The next court after filing the declaration, and imparlance given, the defendant is to put in his answer or plea, and if the plaintiff join issue, they may proceed to trial the next court day, if they proceed not farther by replication, rejoinder, surrejoinder, and the like. *id.*

Plea of freehold.

15. But if freehold is pleaded by the defendant, this court can proceed no further, for freehold shall never be tried without writ; therefore the cause must be removed: as when a defendant avoweth for damage feasant, and the plaintiff justifieth by reason of common of pasture. *Wood. b. 4. c. 1.*

Judgment and distress.

16. Where a verdict is given for the plaintiff, and judgment entred thereupon, a *fiery facias* may be awarded against the defendant's goods, which may be taken by virtue thereof, and appraised and sold, to satisfy the plaintiff; but if the defendant hath no goods whereupon to levy, the plaintiff remains without remedy in this court, for it being no court of record, no *capias* lies there; but an action may be brought at common law upon the judgment entred. *Greenw. 11. Read. County C.*

Removal by recordare.

17. Causes are removed out of this court, by a writ of *recordare*, which issues out of the chancery, directed to the sheriff, commanding him to send the plaint that is before him in his county court (without writ of *justicies*) into the court of king's bench or common pleas, to the end the cause may be there determined. And the sheriff is hereupon to summon the other party to be in that court (into which the plaint is to be sent) at a day certain. And of all this he is to make a certificate under his own seal, and the seals of four suitors of the same court. *Read. County C.*

Removal by pone.

18. Causes are also removed by *pone*, which differs in nothing from a *recordare*, but that it removes such suits as are before the sheriff by writ of *justicies*, and a *recordare* is to remove the suit that is by plaint only, without writ. *id.*

Removal after discontinuance.

19. And altho' the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench, and it shall be good, and he shall declare upon the same. *id.*

Outlawry pronounced.

20. In this court, after the *quinto exactus*, the coroner gives judgment of outlawry. *4 Inst. 266.*

Hundred court.

21. Out of the county court is derived the hundred court, for the ease of the subject; and it hath like jurisdiction as the county court, and may be held every three weeks. *2 Inst. 71.*

Demurrer.

Demurrer, what.

A Demurrer (from *demorari*) signifies an *abiding* in point of law, upon which the defendant joins issue, allowing the fact to be true as laid in the indictment. *Wood b. 4. c. 5.*

In criminal cases.

In criminal cases not capital, if the defendant demur to an indictment, the court will not give judgment against him to answer over, but final judgment. *2 Hawk. 334.*

In cases of felony.

But regularly in all cases of felony, where a man pleads a special matter, tho'

tho' he conclude his plea with not guilty to the felony, or do not conclude it so, yet if his plea be tried, or found, or ruled against him, he shall be put to his plea of not guilty, and be tried for the felony; for tho' a man shall lose his land in some cases, for mispleading, yet he shall not lose his life for mispleading. 2 H. H. 257.

Deodand.

1. **D**EODAND is, when any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 3 Inst. 57. Deodand, what?

2. This, altho' it be not properly homicide, nor punishable as a crime. Forfeiture to the King, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder: And the unhappy instrument or occasion of such death, is called a deodand (*deo dandum*) and forfeited to the king, and was anciently paid into the hands of the king's almoner, to be applied to pious uses for the soul of the deceased. Also all such weapons, whereby one man kills another, are forfeited. 3 Inst. 57. 1 Haw. 66. Fost. 265.

3. This forfeiture is still part of the casual revenue of the crown, unless where lords of franchises are intitled to it by grant. For no man can prescribe to it, or to the goods of self-murderers or other felons, or of outlaws, happening within his royalty. Fost. 265. Casual revenue.

4. It seems clearly settled, contrary to the former opinions, that a horse or the like, killing an *infant* within the age of discretion, is as much forfeited as if he were of age. 1 Haw. 66.

5. Also, it was anciently holden, that things *fixed to a freehold*, as the wheel of a mill, or a bell hanging in the steeple, may be deodands, but by the latter resolutions they cannot, unless they were severed before the accident happened. 1 Haw. 66. Fixtures to a freehold.

6. It is agreed by all, that a *ship* in salt water, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes not such misfortunes to the ship. Also it seems clear, that when a man riding on a horse over a river, is drowned thro' the violence of the stream, the horse is not forfeited, because not that, but the water caused his death.

But it is said, that a ship, by a fall from which a man is drowned, in the fresh water, shall be forfeited, but not the merchandize therein; because they no way contribute to his death. And by the same reason it seems, that if a man riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon only are forfeited, and not the loading, because it no way contributed to his death; for which cause, where a thing not in motion causes a man's death, that part thereof only, which is the immediate cause, is forfeited. As where one climbing upon the wheel of a cart, while it stands still, falls from it, and dies of the fall, the wheel only is forfeited. Ship falling upon a man.

But if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof

Deodand.

thereof made the hurt the greater; and it is a general rule, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also. 1 *Haw.* 66.

7. Thus a cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon an high bank and overturned, and threw a person that was in the cart just before the wheels of the waggon, and the waggon ran over him and killed him; it was resolved in this case, that the cart, waggon, loading, and all the horses were deodands, because they all moved to the death. 1 *Salk.* 220.

8. If a weight of earth fall upon a worker in a mine, and kill him; the weight of earth is forfeit, and not the whole mine. 1 *H. H.* 420.

Within a year
and day.

9. In all these cases, if the party wounded die not of his wound, within a year and a day after he received it, there shall be nothing forfeited, for the law doth not look on such a wound as the cause of a man's death, after which he lives so long: But if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time. 1 *Haw.* 67.

Deodand must
be seized.

10. However nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; but after such inquisition, the sheriff is answerable for the value of it, and may levy the same on the town where it fell, and therefore the inquest ought to find the value of it. 1 *Haw.* 67.

11. And if the coroner omits his duty in this case, the inquisition may be made by the commissioners of gaol delivery, oyer and terminer, or of the peace, 1 *H. H.* 419.

12. After all, as this forfeiture seemeth to have been originally founded rather in the superstition of an age of ignorance, than in the principles of sound reason and policy, it hath not of late years met with great countenance in *Westminster-hall*. And when juries have taken upon them to use a judgment of discretion, not strictly within their province, for reducing the quantum of the forfeiture, the court of king's bench have refused to interpose in favour of the crown or lord of the franchise.

In the case of *K. and Rolfe*, coroner of *Kent*, *H. 5 G. 2.* the coroner's inquest found that a man sitting on his waggon accidentally fell to the ground, and that the horses drawing the waggon forward, one of the fore wheels crushed his head, of which he instantly died, and then concluded that only the wheel, on which they set a small value, moved to his death. A motion was made, in behalf of Mr. *Mompesson*, lord of the franchise, for quashing this inquisition, upon affidavits tending to shew, that the cart and horses were equally instrumental, which indeed the finding of the jury did sufficiently imply. But the court was very clear, that neither this court nor the coroner can oblige the jury to conclude otherwise than they have done, and would not suffer the affidavits for quashing the inquisition to be read.

A like case came on, *M. 29 G. 2. K. and Drew*, coroner of *Middlesex*. The coroner's jury, upon view of the body of a person killed by the like accident, found that only one wheel of the waggon moved to the death.

The

The court, on motion in behalf of the lord of the franchise, granted a rule for shewing cause why the inquisition should not be quashed for this misbehaviour of the jury. On the day for shewing cause, Mr. *Hume Campbel*, counsel for the lord of the franchise, informed the court, that upon looking into precedents, he was satisfied he could not support the rule: And thereupon it was discharged. The case of the *King* and *Rolfe* was mentioned on this occasion, and greatly relied on. *Fost.* 266.

Dissenters.

I. Protestant dissenters exempted from certain penalties by the act of toleration.

II. Protestant dissenters intitled to certain privileges by the act of toleration.

III. Laws against dissenters not altered by the act of toleration.

I. Protestant dissenters exempted from certain penalties by the act of toleration.

BY the 2 *Eliz. cap. 2.* Every person not having reasonable excuse, shall resort to their parish church or chapel, or upon reasonable let thereof, to some usual place where common prayer shall be used, on every Sunday and holiday; on pain of punishment by the censures of the church, or of forfeiting for every offence 12 *d.* Absenting from church.

Now by the act of toleration, made 6 *Geo. 2. cap. 5.* it is enacted, that the statute aforesaid shall not extend to any person dissenting from the church of *England*, who shall be qualified in the manner following: Toleration.

(1) They shall at the general sessions of the peace, take the oaths of allegiance and supremacy.

(2) They shall also there make and subscribe the declaration against popery.

(3) The place of meeting shall be certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the general or quarter sessions, and registred in the said bishop's or archdeacon's court, or recorded at such sessions. And the register, or clerk of the peace, shall register or record the same, and give certificate thereof to any who shall demand it, for which no more shall be taken than six-pence. Place of meeting to be certified.

(4) The doors of the place where they meet shall not, during such time of their meeting, be locked, barred or bolted. Doors not to be locked.

(5) They shall not in writing deny the doctrine of the blessed trinity.

2. And by the aforesaid act of toleration, it is provided, that no person dissenting from the church of *Ireland*, in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of dissenting protestants, shall be liable to any of the aforesaid penalties, who shall be qualified as follows: Qualification of teachers.

(1) He

Dissenters.

- (1) He shall at the sessions take the oaths aforesaid.
- (2) He shall there make and subscribe the declaration prescribed by *Br. st. 1 G. 1. c. 13.*
- (3) The place for worship shall be certified as before.
- (4) The doors of the place where he shall preach or teach, shall not be locked, barred, or bolted.
- (5) He shall not deny, in his preaching or teaching, the doctrine of the blessed trinity.

Quakers.

3. By the act of toleration, quakers shall be discharged of the penalties of these laws, and of all others made against popish recusants, or protestant non-conformists, and shall enjoy all other benefits, under the like limitations, which any other dissenters enjoy, on their qualifying themselves in the same manner as other dissenters; except that instead of the oaths at sessions, they shall be allowed to make and subscribe a declaration of fidelity.

Dissenters taking the oaths, &c.

4. If any person dissenting from the church of *England* (not in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation) who should have been intitled to the benefit of the toleration act, if he had duly taken, made and subscribed the oaths and declaration, or otherwise qualified himself as required by the act, shall be prosecuted on any of the penal statutes, from which protestant dissenters are exempted by the said act,—shall at any time during such prosecution, take, make, and subscribe, the said oaths and declaration, or being a quaker shall qualify according to that act, either in the manner prescribed by that act, or before two justices who shall take and return the same to the next sessions to be there recorded; such person shall be intitled to the benefit of the act, as fully as if he had qualified himself in the time prescribed by the act, and shall from thenceforth be discharged from all the penalties and forfeitures incurred by force of any of the aforesaid penal statutes.

Discharged from penalties.

II. Protestant dissenters intitled to certain privileges by the act of toleration.

Besides the exemption from penalties, his Majesty's protestant subjects are by the act of toleration intitled to certain privileges: which are of two kinds;
 1. Such as concern all protestant dissenters in general. 2. Such as concern their teachers in particular.

No prosecution for absenting from church.

1. As to all *protestant dissenters in general*.—They shall not be prosecuted in any ecclesiastical court, for or by reason of their not conforming to the church of Ireland.—But this shall not exempt them from paying of tithes, or other parochial duties, or any other duties to the church or minister, nor from any prosecution in any ecclesiastical court, or elsewhere, for the same.

Since

Since this act, Mr. *Hawkins* observes from 3 *Lev.* 376. a prohibition will lie to the spiritual court proceeding against persons for incontinency, who have been married in a licensed conventicle. The case was this; Two persons, who were published and married in a conventicle, were afterwards libelled against in the spiritual court, for incontinence and fornication; and upon moving for a prohibition, time was assigned to shew cause why it should not go, and the proceedings in the ecclesiastical court were stayed in the mean time. Afterwards, it was agreed that a prohibition should be granted, and that the plaintiff should declare; that, so upon demurrer, the point might be tried. But what the judgment was, or whether the cause proceeded to trial, doth not appear by the report. *Gibb.* 617.

Marriage in a conventicle.

But by 11 *Geo.* 2. *cap.* 10. Protestant dissenters, who have entred, or shall hereafter enter into matrimonial contracts in their own congregation before their ministers or teachers, and thereupon live together as husband and wife, shall not be prosecuted in any ecclesiastical court *ex officio mero*, or on the presentment of any minister or church-wardens, of the same.

No prosecution *ex officio*.

Provided, that such protestant dissenters, and minister or teacher, have, or shall take the oaths, and subscribe the declaration, according to 6 *Geo.* 1. *cap.* 5.

Mr. *Hawkins* likewise observes (1 *Haw.* 12.) that it having been doubted whether dissenting schoolmasters, as such, were exempted by the toleration act from the penalties inflicted upon them in the several acts against dissenters, it was farther enacted by the 12 *An.* c. 7. that whoever shall keep any school or seminary, or teach any youth as tutor or schoolmaster (unless he instruct them only in reading, writing, arithmetick, or such mathematical learning as relates to navigation, or some mechanical art, and that in the *English* tongue) without having first subscribed the declaration of the 13 & 14 *C.* 2. relating to conformity with the church of *England*, and without a licence from the bishop, he shall be imprisoned for three months. But this was repealed by the 5 *G.* c. 4. So that the doubt is left where it was.

School-masters dissenting.

Mr. *Shaw* in his parish law, p. 68. says, it is held (but doth not say by whom) that dissenters by the act of toleration are not exempted, either from the penalties of the 1 *J.* c. 4. or of the 13 & 14 *C.* 2. c. 4. against teaching a school without licence from the bishop.

In the case of *K. and Davison, T. 12 W.* as reported both by *Salkeld* and *L. Raymond, Davison*, a quaker, on an *habeas corpus* upon a writ of *excommunicato capiendo*, for teaching school without licence, was admitted to bail, till it should be determined whether this was an offence. But it doth not appear from either of those reports, what was the determination. 1 *Salk.* 105. *L. Raym.* 603.

Quakers teaching without licence.

Upon the whole it seemeth somewhat strange, that in a case of so much importance as is the education of children, this matter during the space of so many years hath not yet been settled beyond all doubt.

Moreover; if any person dissenting from the church of *Ireland*, shall be appointed to the office of high constable, petit constable, churchwarden, overseer of the poor, or any other parochial or ward office, and such person shall scruple to take upon him any of the said offices in regard of the oaths, or any other matter or thing, required by the law to be taken or done, in respect of such office, every such person shall and may execute such office by

Parish officers.

Dissenters.

a sufficient deputy by him to be provided, that shall comply with the laws on this behalf. Provided that the deputy be allowed and approved by such persons, and in such manner, as such officers should by law have been allowed and approved. 6 G. c. 5. f. 4.

Teachers exempted.

2. *As to their teachers or preachers*—Every teacher or preacher, in holy orders, or pretended holy orders, that is a minister, preacher, or teacher of a congregation, that shall take the oaths, and subscribe the declaration and articles as aforesaid, shall be thenceforth exempted from serving upon any jury, or from being chosen or appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred, city, town, or parish. *Ibid.* f. 9.

III. Laws against dissenters not altered by the act of toleration.

Popish recusants.

1. No clause in the toleration act shall give any ease or benefit, to any popish recusant; or to any that shall deny in preaching or writing the doctrine of the trinity. 6 Geo. 1. cap. 5. f. 11.

Distress.

THE remedy for recovering rent by way of distress seems first to have come over to us from the civil law. For anciently in the feudal law, the not paying attendance at the lord's courts, or not doing the feudal service was a forfeiture of the estate: But these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law; that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord, and the whole profits arising from the land are liable to the lord's seizure for the payment and satisfaction thereof.

Concerning which, we will shew,

- I. *For what cause a distress shall be.*
- II. *What goods may be distrained, and what not.*
- III. *At what time the distress shall be taken.*
- IV. *Where the distress shall be made.*
- V. *That reasonable distress shall be taken.*
- VI. *Manner of making distress.*
- VII. *Distress how to be demeaned.*
- VIII. *Of rescous and pound breach.*
- IX. *Replevying the distress.*
- X. *Sale of the distress.*
- XI. *Landlord re-entring on non-payment.*
- XII. *Case of tenant holding over.*
- XIII. *Attorning to strangers.*
- XIV. *Rent in case of an extent or execution.*
- XV. *Rent how far recoverable by executors or administrators.*

I. For

I. For what causes a distress shall be.

1. Distress for rent must be, for rent in arrear; therefore it may not be made on the same day on which the rent becomes due; for if the rent is paid in any part of that day, whilst a man can see to count money, the payment is good. Rent in arrear.

2. It must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent behind, before the distress the tenant may upon the land tender the arrearages, and if after that a distress be taken it is wrongful. And if the landlord have distrained; if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the distress, and if he doth not, the detainer is unlawful. Even so it is, in case of a distress for damage feasant (or damage done by cattle trespassing) the tender of amends before the distress, maketh the distress unlawful; and after the distress, and before the impounding, the detainer unlawful. Tender of payment.

Inst. 107.

But in this case; altho' the owner tender sufficient amends, yet he cannot take his beasts out of the pound, if the amends be refused; but he must replevy: and if it be found at the trial that the amends was not sufficient, the person on whom they trespassed shall have damages; if the amends tendered were sufficient, then the owner of the beasts shall have damages.

Dr. & St. 112.

3. The like remedy may be had by distress, impounding and sale, in cases of rents seck, rents of assize, and chief rents, as in case of rents reserved upon lease. Seck rents and chief rent. *11 Ann. cap. 2. sect. 7.*

Note, there are three kinds of rents; rent service, rent charge, and rent seck.

Rent service is, where the tenant holdeth his land of his lord, by fealty and certain rent; or by homage, fealty, and certain rent; or by other service, and certain rent. And it is called a rent service, because it hath some corporal service incident to it, which at the least is fealty. *1 Inst.* 141, 2.

Rent charge is so called, because the land for payment thereof, is charged with a distress; but before this act such distress could not be sold, but only detained till the rent should be paid.

If the rent be reserved without any clause put in the deed of distress for the same, then it is called a rent seck, *redditus ficcus*, or dry rent: and the difference between a rent charge and a rent seck is, that there is a clause of distress annexed to one, and no such clause to the other: and therefore the one is a charge upon the land, but for the other the grantee had formerly no remedy but to charge the person of the grantor in a writ of annuity.

1 Inst. 143.

Rents of assize are the certain rents of freeholders and ancient copyholders, so called because they are assized and certain, and thereby distinguished from *redditus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. *2 Inst.* 19.

5. So an action of debt may be brought against a tenant for life, in pursuance of the statute of the 9 *An. c. 8.* which enacteth, that whereas before Rent reserved on a lease for life.

Distress.

the said statute no action of debt did lie against a tenant for life or lives, for any arrears of rent during the continuance of such estate for life or lives; it shall be lawful for any person having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears, in like manner as he might have done in case such rent were reserved upon a lease for years. 9 *Ann. cap. 8. sect. 5.*

Lease determined.

6. Persons having rent in arrear, upon any lease determined, may distrain for such arrears after the determination of the lease, in the same manner as if it had not been determined; provided that such distress be made in six months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrear became due. *Ibid. sect. 7. & sect. 8.*

Lease renewed.

7. Whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under tenants; and whereas many of those leases cannot be renewed without a surrender of all the under leases derived out of the same, whereby it is in the power of any such under tenants to prevent or delay the renewing of the principal lease; it is enacted, that in such case, the chief leases may be renewed, without surrendring all the under leases; and the like distress or entry may be had, as if the former chief lease had been still kept on foot and continued, or the under leases had been renewed under such new principal lease. By the 5 *Geo. 2. cap. 4. sect. 4.*

Two distresses for one rent.

8. Before the statute 7 *Will. 3. cap. 22.* in case a distress was too little, where sufficient distress was to be had, a man could not distrain again, be the demand never so great; for it was his folly that at first he distrained no more. *Mo. 7. Comb. 547.*

But now, by the said statute, in all cases where the value of the cattle distrained shall not be found to be to the full value of the arrears distrained for; the party to whom such arrears were due, his executors or administrators, may distrain again for the residue of the said arrears. *f. 4.*

And if the distress be taken of goods without cause, the owner may make *rescous*; but if they be distrained without cause, and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law. 1 *Inst. 47.*

II. What goods may be distrained, and what not.

Valuable property.

1. Distress for rent must be of a thing, whereof a valuable property is in somebody; and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be distrained. 1 *Inst. 47.*

Separate from the person.

2. Altho' it be of valuable property, as a horse; yet when a man or woman is riding on him, or an ax in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained. 1 *Inst. 47.*

But it is said, that if one be riding upon a horse *damage feasant*, the horse may be led to the pound with the rider upon him. 1 *Sid. 422, 440.*

And it hath been held, that horses joined to a cart, with a man upon it, cannot be distrained for rent (altho' they may for *damage fea-*

feasant); but both cart and horses may, if the man be not upon the cart. 1 *Vent.* 36.

3. Valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequent are for the commonwealth, and are there by authority of law: as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor a horse in an hostelry, nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a taylor's shop, nor sacks of corn or meal in a mill, nor any thing distrained for *damage feasant*, for it is in custody of the law; and the like.

For maintenance of trades

1 *Inst.* 47.

4. Beasts belonging to the plough shall not be distrained (which is the ancient common law of ——— for no man shall be distrained by the utensils or instruments of his trade or profession, as the ax of the carpenter, or the books of a scholar) while goods or other beasts may be distrained. 1 *Inst.* 47.

Tools of a man's profession.

But this rule holds only in distresses for rent arrear, amerciaments, and the like; but doth not extend to cases, where a distress is given, in the nature of an execution, by any particular statute, as for poor rates, and the like. 3 *Salk.* 136.

5. Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a house, or the like, cannot be distrained. 1 *Inst.* 47.

Things fixed to the freehold.

6. Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained. 2 *Bac. Abr.* 109.

Things for which a replevin will not lie.

But money in a bag sealed may be distrained; for that the bag sealed may be known again.

7. By the 7 *Will.* 3. c. 22. Persons having rent arrear on any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with the rent, and may lock up or detain the same in the place where found, in the nature of a distress; so as the same be not removed to the damage of the owner, out of the place where found and seized, but be kept there (as impounded) till replevied or sold. *f.* 3.

Corn or hay cut.

8. Where a stranger's beasts escape into the land, they may be distrained for rent, tho' they have not been *levant* and *couchant* (that is, tho' they have not been in the ground for a good space of time, or so long as to have lain down and rose up again to feed) provided they are trespassers: but if the tenant of the land is in default, in not repairing his fences, whereby the beasts came into the land, the lessor cannot distrain such beasts, tho' they have been *levant* and *couchant*, unless he have caused notice to be given to the owner, and the owner suffers them to remain there afterwards. *Lutw.* 364.

Cattle escaped on the premises.

But in case of an antient feignory, the lord may distrain cattle for services, which came in by escape, tho' they were not *levant* and *couchant*, altho' it be in default of the fences, which the tenant of the land ought to maintain, because the lord hath nothing to do with the repairing of the fences, and he hath no remedy but by distress; But the owner may prevent the distress, by making fresh pursuit; for then the cattle remain

main

main as it were in his own possession. L. Raym. 168, 9. H. 8 W. Kemp and Crewes.

But in case of rent reserved upon a lease for years, the lessor cannot distrain such cattle, until they be *levant* and *couchant*; for if the lessor had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a lessee, he ought by covenant to oblige him to repair: and therefore in that case, if the law would allow the lessor to distrain the cattle of a stranger which come in by escape, before that they be *levant* and *couchant*, it would be in effect to allow a man to take advantage of his own wrong. Therefore if the cattle come in by default of the owner of the cattle, then they may be distrained before they be *levant* and *couchant*; but if in default of the tenant of the land, there they cannot be distrained until they have been *levant* and *couchant*, that is to say, for rent upon leases for years. And in such case, the lessor shall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his distress; and if he doth not come to take them away, then they become distrainable. And by Treby chief justice; Where the cattle escape accidentally, there they are not distrainable, until they have been *levant* and *couchant*; but if they escape by default of their owner, they are distrainable the first minute. *id.*

Cattle depastured.

9. A person driving sheep to ——— to sell, by agreement with the master of an inn, puts them into a ground at so much a score for a night. The landlord seeing them, asked whose they were, but consented to their staying there, and afterwards the same evening distrained them for rent due to him from the master of the inn. And it was adjudged for the landlord. T. 1 W. Fowkes and Joyce, in C. B. 3 Lev. 260. 2 Vent. 50.

But in the same case, upon a bill for relief in equity, the lords commissioners seemed to think, that the grounds lying to the inn, and used therewith, ought to have the same privilege as the inn hath, and that passengers cattle ought not to be distrainable there. 2 Vern. 129.

And it appeared in this case, that on the landlord's coming and seeing the sheep, he pretended to be angry. Upon which, the owner offered to take out the sheep, at which time they were not distrainable for the rent, having not been *levant* and *couchant* upon the lands. So that the court looked on the consent as a fraud, to get them to be left all night, by which they became liable to the distress. And it was decreed, that the landlord should answer for the value of the sheep, and pay costs both in law and equity Prec. Chan. 7.

So where a rent charge was arrear for 20 years, and cattle escaped out of the next ground, and were distrained; lord Nottingham (in equity) relieved against it. 2 Vern. 231. H. 1690. Brodon and Pierce.

Cattle damage feasant.

10. If ten head of cattle are doing damage, a man cannot take one of them and keep it till he be satisfied for the whole damage; but he may bring an action of trespass for the rest. 12 Mod. 660. H. 13 W. Vasper and Edwards.

If a man hath common for ten cattle, and he puts in more; the surplussage above ten may be taken *damage feasant*. 1 Roll's Abr. 665.

If a man come to distrain, and see the beasts in his ground, and the owner chase them out, of purpose before the distress taken; yet the owner of

of the soil cannot distrain them, and if he doth, the owner of the cattle may rescue them; for the beasts must be *damage feasant* at the time of the distress. 1 *Inst.* 161.

For distress *damage feasant* is the strictest distress that is; and the thing distrained must be taken in the very act: for if the goods are once off, tho' on fresh pursuit, the owner of the ground cannot take them. 12 *Mod.* 661.

III. At what time the distress shall be taken.

For a rent or service the lord cannot distrain in the night, but in the day time; and so it is of a rent charge: but for *damage feasant*, one may distress by night. *I Inst.* 142.

For before sun rising, or after sun set, no man may distrain but for *damage feasant*. *Mirroure c. 2. f. 26.*

IV. Where the distress shall be made.

Where.

1. The king's officers, as sheriffs and other, shall not take distresses in the fees wherewith churches in times past have been endowed; but distresses may be taken in possessions of the church newly purchased. *Ed. 2. c. 9.*

2. A man may distrain in places or lands within the fee, liable to distress, and not elsewhere. 52 *H. 3. c. 15.* 2 *Inst.* 131. *Mir. c. 2. f. 26.*

3. And by the 11 *G. 2. c. 19.* The landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any ways belonging to the premises demised. *f. 8.*

4. No person (except the king's officers) shall take distresses in the king's highway. 52 *H. 3. c. 15.*

And the reason is, because the king's subjects ought to have free passage, as well to fairs and markets, as about their other affairs. But yet this shall not be taken, to make the distress utterly unlawful, so as to take advantage thereof in bar to an avowry, but to this purpose, that if the lord distrain in the highway, the tenant may have an action against him upon this statute. 2 *Inst.* 131, 132.

5. But by the 15 *G. 2. c. 8.* If any tenant for life, years, at will, sufferance, or otherwise, shall fraudulently or clandestinely convey off the premises his goods or chattels, to prevent the landlord from distraining; such landlord, or any person by him lawfully empowered, may in 30 days next after such conveying away, seize the same wherever they shall be found, and dispose of them in such manner, as if they had been distrained on the premises. *f. 5.*

But no landlord shall distrain any goods sold *bona fide*, and for a valuable consideration, before such seizure made, to any person not privy to such fraud. *f. 2.*

And if any tenant shall so fraudulently remove and convey away his goods or chattels, or if any person or persons shall wilfully and knowingly aid or assist

Distress.

assist him in such fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing the same; every person so offending shall forfeit to the landlord double the value of such goods, to be recovered in any court of record in *Dublin*. *f. 3.*

Where the goods so fraudulently carried off or concealed, shall not exceed the value of twenty pounds, it shall be lawful for the grantees of rent charges, grantors of fee-farms or landlords, from whose estate such goods were removed, or their bailiff, servant or agent in their behalf, to exhibit a complaint by civil bill against such offenders, before the judges at the respective assizes, to be held for the several counties wherein such offenders reside, or before the justices at the quarter-sessions to be held for the county, or the county of the city of *Dublin*, in case the premises from which such removal is made, lie within those districts, who upon full proof of the offence, and also the value of the goods so fraudulently carried off or concealed, shall decree the offenders to pay double the value of the said goods to such grantees of rent charges, grantors of fee-farms or landlords, or their bailiff, servant or agent, with like execution and remedy by appeal as in other cases of civil bill. *f. 4.*

V. That reasonable distress shall be taken.

Distress to be reasonable.

Distresses shall be reasonable, and not too great; and he that taketh great and unreasonable distresses, shall be grievously amerced. *52 H. 3. c. 4.*

For example, if the lord distrain two or three oxen for *12 d.* or the like small sum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the *12 d.* of his own shewing, he shall make fine: or the party may have his action upon this statute. *2 Inst. 107.*

If the lord distrain an ox, or horse, for a penny; if there were no other distress upon the land holden, the distress is not excessive: but if there were a sheep, or a swine, or the like, then the taking of the ox or horse is excessive, because he might have taken a beast of less value. *2 Inst. 107.*

VI. Manner of making distress.

Breaking gates.

1. Gates or inclosures may not be broken open, nor thrown down, to make a distress. *1 Inst. 161.*

Opening doors.

2. Nor may the lessor enter into the tenant's house, unless the doors are open. *Read. Distr. 2 Bac. Abr. 111.*

Upon a question about taking a distress, it was held by the lord chief justice *Hardwicke*, at the summer assizes at *Exeter*, 1735, that a padlock put on a barn door could not be opened by force, to take the corn by way of distress. *Vin. Distr. (E. 2.) 6.*

Part in the name of the whole.

4. If a landlord comes into a house, and seizes upon some goods as a distress, in the name of all the goods of the house; that will be a good seizure of all. *6 Mod. 205.*

VII. Distress

VII. Distress how to be demeaned.

1. By the 52 H. 3. c. 4. *None shall cause any distress that be hath taken, to be driven out of the county where it was taken: and if one neighbour do so to another of his own authority (as for damage feasant, or rent charge, 2 Inst. 106.) he shall make fine as for a thing done against the peace; and if the lord so presume to do against his tenant, he shall be grievously punished by amerciamment.* Impounding off the premises.

Before this act, at the common law, a man might have driven the distress to what county he pleased: which was mischievous, for two causes; 1. Because the tenant was bound to give the beasts being impounded in an open pound sustenance, and being carried into another county, by common intendment he could have no knowledge where they were. 2. He could not know where to have a replevy; but the party was, before this statute, driven to his action upon his case. 2 Inst. 106.

And albeit this statute be in the negative, yet if the tenancy be in one county, and the manor in another county, the lord may drive the distress which he taketh in the tenancy to his manor in the other county; for that the tenant is out of both the said mischiefs: for the tenant by doing of suit and service to the manor, by common intendment may know what is done there, and therefore may give his beasts sustenance. And to know where to have his replevy, the bailiff of the manor usually drives the cattle distrained to the pound of the manor. And hereby it is to be noted, that a case out of the mischief, is out of the meaning of the law, tho' it be within the letter. 2 Inst. 106.

And by 10 Car. 1 sess. 2. c. 25. It is further enacted, that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe, where such distress shall be taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the said distress was taken; and no cattle or other goods distrained for any cause at one time, shall be impounded in several places, whereby the owner may be constrained to sue several replevies; on pain of 100 s. to the party grieved, and treble damages. s. 1.

T. 21. G. 2. *Gimbart and Pelab.* The defendant justified impounding cattle damage feasant. And on evidence it appeared, he put them into the next pound, though it happened to be in another county. And *Lee Ch. J.* held, it did not make him a trespasser, though it subjected him to the penalty of the statute. *Str.* 1272.

Note, a pound is either overt or open, as in a pinfold made for such purposes, or in his own close, or in the close of another by his consent; and it is therefore called open, because the owner may give his cattle meat and drink, without trespass to any other, and then the cattle must be sustained at the peril of the owner. or it is a pound covert or close, as to impound the cattle in some part of his house; and then the cattle must be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore.

1 Inst. 47.

E e

But

But if the distress be of utensils of household, or such like dead goods, which may take harm by wet or weather, or be stolen away; there he must impound them in a house, or other pound *covert*, within three miles in the same county; for if he impound them in a pound *overt*, he must answer for them. 1 *Inst.* 47.

Impounding on
the premises.

2. By 15 G. 2. c. 8. Any person distraining, may impound or otherwise secure the distress, of what kind soever it be, in such place, or on such part of the premises, as shall be most convenient; and may appraise, and sell the same, as any person before might have done off the premises. *f.* 10.

Using the goods
distrained.

3. Cattle distrained may not be worked or used, unless for the owner's benefit, as a cow milked, or the like; much less may they be abused or hurt. *Cro. Jac.* 148.

And it hath been said in this case, that even a cow may not be milked; for tho' the cow be better for this, yet he who took the distress ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, yet he who took the distress may distrain again. 2 *Bac. Abr.* 112.

Distress dying.

4. So if the distress be lost by the act of God: as if the distress dies in the pound, without any default in the distrainer; in such case, he who made the distress may distrain again. 1 *Salk.* 248.

Killed.

5. It is the distrainer's own fault, if he puts the distress in a pound which will not hold it; but he cannot justify the tying of cattle in the pound; and if he ties a beast, and it is strangled, he must pay damages. 1 *Salk.* 248.

VIII. Of rescous and pound-breach.

Rescous and
pound-breach.

1. By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth against the peace, and doth trespass to the king, and to the lord of the fee, and to the sheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of justice; and therefore hue and cry is to be levied against him, as against those who break the peace. *Mir. c.* 2. *f.* 26. And the party who distrained may take the goods again, wheresoever he shall find them, and impound them again. 1 *Inst.* 47.

2. And by statute, on any pound-breach or rescous, of goods distrained for rent, the person grieved thereby, shall in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to have come to his use or possession. 7 *W.* 3. c. 22. *f.* 6.

Treble damages and costs.] In the case of Sir *Wilfred Lawson v. Storey*, *M.* 6. *W.* It was adjudged, that the costs shall be treble as well as damages. *L. Raym.* 20.

3. When a man hath taken distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner; if he that took the

the distress demand them of the owner, and he delivered them not, this is a rescous in law. 1 Inst. 161.

By the act 4 G. 1 c. 5. s. 1. Where any distress shall be taken by *any* landlord having authority to distrain or by any persons by such landlord impowered, if such distress or any part thereof be rescued, every person so rescuing being convict thereof, shall be committed in execution by the court before whom such conviction shall be had for such fine as the court shall impose on such offenders, and in case the party convicted shall not pay to the sheriff of the county such fine as shall be imposed for such rescue within one month after commitment, the party convicted on default of such payment, shall be conveyed by the sheriff to the house of correction or some workhouse in the county, and there kept at hard labour for any time not less than three months nor exceeding six months according to the discretion of the judges or justices before whom such offender shall be convicted. Fine for rescuing distress.

It shall be lawful for such landlords from whom any distress shall be unlawfully rescued, to bring his ejectment and recover the premises as if no distress were to be found on the same, and if such tenants suffer judgment to pass against the casual ejector for want of appearing and taking defence or of confessing lease entry and ouster, or on coming into court a verdict shall pass against them on proof of the said rescue at the trial, if such tenants shall not pay all rent and arrear together with full costs within six calendar months after judgment obtained, the lessees or their assignees shall be barred from all relief in law or equity other than by writ of error for reversal of such judgment, in case the same shall be erroneous and the demised premises discharged from such lease. s. 2. Ejectment.

Also, if any distress lawfully taken for rent or services or other legal dues shall be rescued, if the person on whose behalf such distress was taken, his agent or bailiff or any person employed in taking such distress, shall within fourteen days after such rescue make oath thereof before any justice of the peace of the county where such rescue shall have been committed, such justice shall by warrant under his hand and seal order one or more constables of the said county to go with and assist the person on whose behalf such distress was taken, or his agent or bailiff, or the person making such oath to distrain again, and to take with him a number of persons sufficient to secure and convey the distress so to be taken to some lawful pound. 8 G. 1. c. 2. s. 8. Warrant to assist.

Provided that before any justice of the peace shall grant such warrant, there shall be deposited in the hand of such justice, such reasonable sum of money as such justice shall require to satisfy such constables and their assistants for their trouble in executing such warrant, out of which reasonable satisfaction shall be made by such justice after the service performed to such constables and their assistants, returning the overplus, which money so paid shall in the first place be deducted out of the money arising by such distress in case the same shall be sold, or otherwise shall be levied by distress and sale of the goods as in case of a distress for rent, or by civil bill against the person owing the rent service, or other duty for which such distress was taken with costs of suit. s. 9.

If it shall appear upon oath to any justice of the peace of the county or place where any corn or hay shall be lawfully distrained, that the same is in

Distress.

great danger of being rescued or unlawfully taken away, such justice shall by warrant as afore said, order any constable of the same county to appoint a sufficient number of fit persons to watch and secure such corn or hay until such time as the same might lawfully be sold or shall be otherwise delivered by course of law, and each person so appointed shall be paid such wages as such justice shall direct, not exceeding one shilling nor less than six pence for one days attendance, nor less than one shilling nor more than one shilling and six pence for a day and a night's attendance to any one person. *f. 10.*

Provided that the person at whose instance such warrant shall be granted, shall before the granting of the same deposit such reasonable sum in the hand of the said justice, as such justice shall judge to be sufficient for such payment, which such justice shall cause to be made according to the proportions above mentioned after the service performed, returning the overplus and one moiety of the sum which shall be at the charge of the party on whose behalf such warrant was granted, and as to the other moiety thereof, satisfaction shall be made to the party who made the deposit out of the money arising by such distress in the first place in case the same shall be sold, or otherwise shall be levied by distress and sale as in cases of distress for rent, or by civil bill against the person owing the rent service or other duty for which such distress was taken with costs of suit. *f. 11.*

IX. Replevying the distress.**Replevy.**

1. It is worthy of observation, how provident the law is, that mens beasts, cattle, or other goods be not unjustly or excessively distrained; and if they be, that deliverance be speedily made of them by replevy; otherwise the husbandry of the realm, and mens other trades, might be overthrown or hindred. 2 *Inst* 106.

2. To which purpose, it is enacted by 10 *Car.* 1. *sess.* 2. *c.* 25. that the sheriff of every county shall, at his first county day, or in two months after he hath received his patent of office, appoint four deputies at the least, dwelling not above 12 miles one distant from another, to make replevies; on pain of 5 *l.* a month, half to the king, and half to him that shall sue in any court of record. *f. 3.*

Bond to be taken.

By the act, 8 *G.* 1. *c.* 6. *f. 5.* All seneschals, stewards, judges, or officers of inferior courts having power to grant replevins, are required to take in their names from the plaintiffs in replevin, a bond with sufficient sureties for prosecuting of the suit, and also for returning of the goods so replevied, if a return be awarded before they make deliverance of the distresses.

Assignment of the bonds.

And the seneschals, stewards, judges, or officers of such inferior courts, at the request and costs of the avowant or defendant in such suit, shall assign to the avowant or defendant such bond taken from the plaintiff in replevin, by indorsing the same under their hands and seals in the presence of two credible witnesses, for which six pence shall be paid; and if such bond taken from the plaintiffs in replevin be forfeited, the avowant or defendant in such suit after such assignment made may bring an action in his own name, and proceed to judgment and execution thereupon. *f. 6.*

Note,

Note, *avowry* is, where one takes a distress, and the person distrained Avowry. sues a replevin; then he that took the distress must *avow* and justify in his plea, for what cause he took it, if he took it in his own right; and this is called an *avowry*: If he took it in the right of another, then, when he hath shewed the cause, he must make *conusance* of the taking, as bailiff or servant to him, in whose right he took it. *Terms of the L.*

By the 25 G. 2. c. 13. s. 4. It shall be lawful for all defendants in replevin, to avow or make *conusance* generally, that the plaintiff in replevin, or other tenant of the lands, &c. whereon distress was made, enjoyed the same under a demise or article in writing at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due, without further setting forth the demise or title of such landlords or owners of such lands, &c. and it shall be no objection to any such article, that the same doth not contain an actual demise; and if the plaintiffs in such action shall become non-suit, discontinue their action, or have judgment given against them, the defendants in such replevin, shall recover double costs of suit.

X. Sale of the distress.

Distress taken for an offence presented in the leet, may of common right be sold, because it is a court of record; but otherwise it is, of distresses in courts that are not of record. 12 Mod. 330.

So a distress for an amercement in a court baron cannot be sold, but in such case a distress infinite shall go. 1 Bulst. 52, 53.

25 G. 2. c. 13. s. 5. All distresses for any rent or arrears of rent, shall unless redeemed within eight days after the same shall be distrained, be sold by publick cant to the highest and fairest bidders, at such times and such convenient places as the person distraining, his agent or bailiff shall for that purpose appoint, such person, &c. after default made in redeeming such distress within the time aforesaid, first causing notice in writing of the place and in time intended for such sale, to be posted up six days previous to the time of such sale in the next market town, at the usual place for posting up publick notices.

Distress for rent to be sold.

And the prices for which such distresses shall be *bona fide* then and there sold, shall be deemed as between all the parties aforesaid, and all persons deriving under them respectively, to be the full and real value of such distresses, and such value shall not be afterwards questioned in any court of law or equity, and in case such distresses shall be sold for more than is owing to the persons for whose benefit such distresses shall be taken, such overplus, after deducting thereout all necessary expences attending the taking and selling the said distress, shall be paid over to the persons from whom such distresses shall be taken.

XI. Landlord re-entring on non-payment.

In case where half a year's rent shall be in arrear, and the landlord or lessor hath right by law to re-enter for non-payment thereof; he may, without

Re-entring.

out

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out any formal demand or re-entry, serve a declaration in ejectment; and on recovering judgment and execution, shall hold the premises discharged from the lease. But this not to bar the right of any mortgagee. And if the defendant files a bill in equity, he shall not have an injunction against the proceedings at law, unless he shall bring the arrears into court, and also the costs taxed in the said suit. Provided, that if the tenant shall before the trial in ejectment, pay all the arrears and costs, the proceedings on the ejectment shall thenceforth cease. 11 Ann. cap. 2. s. 2, 3, 4.

Ejectment for non-payment.

By the act 5 Geo. 2. cap. 4. sect. 1. Where one whole year's rent or more shall be due to any landlord for any lands demised for terms of lives, or years determinable upon lives, by leases, minutes, or contracts in writing, containing an actual demise, wherein no clause of re-entry hath been inserted, such landlord or those lawfully claiming under them, may bring their ejectment and recover the possession of such lands, in the same manner as if a clause of re-entry had been expressly contained in such lease, minute, or writing.

Remedy for arrears.

Every lessor recovering in ejectments for non-payment of rent, and obtaining judgment and execution thereupon, shall have the same remedy for all arrears to the time of such execution executed, as such lessors might have had against the lessees or their assignees, if no such ejectment had been brought, or judgment and execution had been obtained, or executed thereupon.

And by 25 Geo. 2. cap. 13. Where any article or contract in writing shall be made of any lands, and the rent payable for the same ascertained by the said article, and the persons to whom such article shall be made or any deriving under them, have enjoyed or shall enjoy the lands under the said article, and one whole year's rent shall be in arrear for the said lands, &c. such landlords, or those lawfully claiming under them, may bring their ejectment and recover the possession of such lands, in the same manner as if such article, &c. in writing contained an actual demise, and as if a clause of re-entry had been expressly specified therein. sect. 2.

Evidence on an ejectment.

On any trial in ejectment for non-payment of rent in pursuance of this act, where one whole year's rent is in arrear before the service of the summons in such ejectment, where it shall be necessary to produce the counterpart of any such article, &c. if it shall appear to the court that no counterpart was perfected, or if perfected, that such counterpart is lost or so mislaid that it cannot be produced upon such trial, if the lessors in such ejectment shall give in evidence the original article, &c. or a copy thereof, or a copy of such counterpart and the enjoyment of the lands, &c. for which such ejectment shall be brought, such original article, or a copy thereof, or a copy of the counterpart shall be of the same effect, as if the counterpart of such article, &c. had been produced and proved. sect. 3.

XII. Case of tenant holding over.

Holding over after the term expired.

1. If any tenant for life or years, or other person who shall come into possession by, from, or under him, shall wilfully hold over any lands, after the determination of such term, and after demand made, and notice in writing given for delivering the possession thereof; he shall, for the time that he

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he shall so hold over, pay double the yearly value thereof, to be recovered by action of debt, in any court of record. 11 Ann. cap. 8. sect. 1.

But this remedy seemeth not altogether adequate to the evil; for three reasons. 1. Because such action is certainly tedious and expensive. 2. It is uncertain, when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into possession, is not obtained by such action, but for that he shall be still to seek. A more short and easy method of ousting the tenant of his possession, seemeth more eligible in the like cases.

2. If any tenant shall give notice of his intention to quit the premises, ^{Holding over after having given notice to quit.} at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time; he shall from thenceforth pay double rent, to be recovered in like manner as the single rent. 15 Geo. 2. cap. 8. sect. 8.

This clause also proceedeth upon a supposition, which perhaps may not be true, namely, that the tenant is a man of substance. It is more likely, that if he were able to live elsewhere, he would not chuse to hold over under such circumstances, nor perhaps would the landlord want to be rid of him. The putting him out of possession, by some expeditious and easy method, seemeth the more adequate remedy in this case also, in like manner as is provided in the case where the tenant deserteth the premises, (in England.)

And by statute 25 Geo. 2. cap. 13. sect. 1. Where the sum to be de- ^{Double value.} manded by an act made in the eleventh year of Queen Anne, for the more effectual preventing of frauds committed by tenants, as the double the yearly value of any lands, &c. held over shall not exceed twenty pounds, it shall be lawful for landlords or their heirs, executors, administrators, or assigns, or such persons to whom the immediate reversion of such lands expectant on the determination of such lease shall belong, to recover the said sum by civil bill to be exhibited against such tenants or persons, as by the said act are made subject to the same, before the justices of assize for the several counties wherein the lands so held over do lie, or before the justices of the quarter-sessions to be held for the county, or for the county of the city of Dublin, in case the lands held over do lie within either of the two last mentioned counties, who are empowered to determine the same, and with like execution and remedy by appeal, as in other cases of civil bill.

XIII. Attorning to strangers.

Whereas the possession of estates is rendered precarious, by tenants attorning to strangers; it is enacted that all such attornments shall be void; unless the same be made pursuant to some judgment at law or decree in equity, or be with the consent of the landlord, or be to a mortgagee after the mortgage is become forfeited. 15 Geo. 2. cap. 8. sect. 7.

And tenants to whom any declaration in ejectment shall be delivered, ^{Copy of ejectment.} shall forthwith give notice thereof to the landlord; on pain of forfeiting to him three years value of the rent: and the landlord may make himself defendant by joining with the tenant, or may appear by himself. s. 12, 13.

XIV. Rent

XIV. *Rent in case of an extent or execution.*

Extent or execution.

In the case of *K. and Cotton, T. 1755*, it was determined by the barons of the exchequer, and affirmed on a writ of error, that if a distress be made for rent, and before the removal of such goods off the premises, an extent is issued, tho' it be not levied, for a debt due to the crown; the extent shall take place of the distress: because the distress doth not oust the property of the effects into the landlord, but is only a pledge or security in his hands for his rent.

But by the 9 *An. c. 8*. No goods being on any messuage, lands, or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord or his bailiff all such rent as shall be then due for the premises, provided that it amount not to more than one year's rent; and if the said arrears shall exceed one year's rent, then the party paying such landlord one year's rent, may proceed to execute his judgment. *f. 1.*

XV. *Rent how far recoverable by executors or administrators.*

Rent recoverable by executors or administrators.

By the 10 *Car. 1. sess. 2*. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, fee tail, and for term of life, of rents services, rent charges, rent secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due to their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have action to levy the same; it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due and not paid at the time of his death, may have an action of debt for the same, against the tenant who ought to have paid the same, or against his executors and administrators; or may distrain upon the premises, so long as they continue in the possession of such tenant in demesne who ought immediately to have paid the same to the testator in his life, or of any other person claiming the same only from or by such tenant by purchase, gift, or descent. 10 *Car. 1. sess. 2. cap. 5. sect. 1.*

In like manner the husband may have action, or distrain for arrears due in the life time and in the right of his wife. *f. 3.*

And if any person shall have any rents or fee farms for the life of any other person, which shall be behind and unpaid at the death of such other person; he, his executors or administrators may have action of debt, against the tenant in demesne that ought to have paid the same when it was first due, his executors and administrators, or may distrain for the same upon the premises, in such like manner as he might have done, if the person by whose death the estate was determined had been in full life. *f. 4.*

Fee-farm.

Note, *fee farm* is, when the lord, upon the creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or at least a fourth part of the value; without homage, fealty, or other

other services, beyond what are especially comprized in the feoffment: and it is called a fee farm rent, because a farm rent is reserved upon a grant in fee. 2 Inst. 44.

Escape.

THIS is to be understood of escapes in criminal cases; and not in civil cases, as for debt or the like.

An escape is, where one that is arrested gaineth his liberty before he is delivered by course of law. *Terms de la ley.* Escape, what.

Escapes are of three kinds. 1. By a person who hath the offender in his custody; this is properly called an *escape*. 2. Caused by a stranger; this is commonly called a *rescue*. 3. By the party himself; either without force, which is simply an escape; or with force, which is *prison breaking*. *Rescous* and *prison breaking* are treated of under their respective titles; and this title treats only of escapes properly so called. Concerning which we will treat in the following order: Several kinds thereof.

I. Of escape by the party himself.

II. Escape suffered by a private person.

III. Escape suffered by an officer.

IV. What is a voluntary, and what a negligent escape.

V. Concerning the retaking of a person escaped.

VI. Indictment for an escape.

VII. Trial and conviction for an escape.

VIII. Punishment of an escape.

I. Of escape by the party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. 2 Haw. 122. Escape by the party himself.

But escape committed by the party himself, belongs more properly to the title *Prison breaking*.

II. Escape suffered by a private person.

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other, who by law ought to have the custody of him. 2 Haw. 138. Escape by a private person.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. 2 Haw. 138.

III. Escape suffered by an officer.

Escape by an officer.

There must be a previous arrest.

And justifiable.

And for a criminal offence.

And not detained only for fees.

Too much liberty, an escape.

Losing sight, an escape.

1. In order to make it an escape, there must be an actual arrest; and therefore if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 Haw. 129.

2. And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 Haw. 129.

3. And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 Haw. 129.

4. Also if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, tho' the judgment were, that *he be discharged paying his fees*, so that till they be paid, the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor: Yet if a person convicted of a crime, be condemned to imprisonment for a certain time, and also *till he pay his fees*, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid; but it seems, that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release. 2 Haw. 129, 130.

5. Also, it is an escape in some cases, to suffer a prisoner to have greater liberty, than by the law he ought to have; as to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody. 2 Haw. 130.

So if a gaoler, or other officer, shall license his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of his prison, tho' the prisoner return again, according as he shall be prescribed. Dalt. c. 159.

6. If the gaoler so closely pursue the prisoner who flies from him, that he retakes him, without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, tho' he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had by the forfeiture on his attainer,

tainer, but also because the publick justice is not so well satisfied by the killing him in such an extrajudicial manner. 2 Haw. 103.

IV. What is a voluntary, and what a negligent escape.

1. Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. Voluntary escape, what?

2 Haw. 130.

2. A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. Negligent escape, what?

Dalt. c. 159.

3. If the constable or other officer, shall voluntarily suffer a thief, being in his custody, to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief: Otherwise if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. Suffering a prisoner to kill himself.

Dalt. c. 159.

V. Concerning the re-taking of a person escaped.

1. If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go; the officer cannot after arrest or take him again by force of his former warrant, for that this was by the consent of the officer: But if he return, and put himself again under the custody of the officer, it seems that it may be probably argued, that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. Let go voluntarily, cannot be retaken.

2. But if the party arrested had escaped of his own wrong, without the consent of the officer, now upon fresh suit, the officer may take him again and again, so often as he escapeth, altho' he were out of view, or that he shall fly into another town or county, and bring him before the justice upon whose warrant he was first arrested. Fresh suit.

And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. 2 Haw. 131, 132.

3. And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters him in an house, the doors may be broke open to take him, on refusal of admittance. Breaking open door to retake.

4. It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he retook him immediately after: And it is clear, that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, tho' he could not possibly retake him; but must in such case be content to submit Retaking excuses not the escape.

to such punishment, as his negligence shall appear to deserve. 2 Haw. 132.

VI. Indictment for an escape.

Indictment

It seems clear, that every indictment (A) for an escape, whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody for such a crime; and that he went at large: and if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and must set forth, not the felony in general, but the particular kind of felony: but it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that it is not material in this case, whether the person who escaped were guilty or not. 2 Haw. 133, 229.

VII. Trial and conviction for an escape.

Gaoler not producing him, a conviction.

1. If the prisoner be of record in a court, and the gaoler being called, cannot give an account where he is, this is a conviction of an escape; but seems not a conviction of a voluntary escape, unless the gaoler confesseth it: and the gaoler may be fined in such a case; but not convicted of felony, without indictment or presentment. 1 H. H. 599, 603.

Felony to be tried before the escape.

2. And it seems to be clear, that a keeper who voluntarily suffers another to escape, who was in his custody for felony, cannot be arraigned for such escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the king and the keeper, because the prisoner is a stranger thereunto; yet he may be indicted and tried for it as a misprison, before the attainder of the principal offender. 2 Haw. 135. 2 Inst. 591, 592.

VIII. Punishment of an escape.

Punishment of escape before arrest.

Of escape by a private person.

Of a negligent escape.

1. If a felon escapes before arrest, it is not punishable in him as felony; but for the flight he forfeits his goods when presented. Hale's Pl. 111.

2. If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him; but if a constable, or other officer, hath the custody of a prisoner, bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 H. H. 601.

3. Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 Haw. 136, 139. 1 H. H. 600, 604.

And it seems to be the better opinion, that a sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 Haw. 135.

Note;

Note; Mr. *Hawkins*, altho' he is one of the most accurate of all writers, yet hath inserted in this place certain penalties for escapes, which were expired above 200 years before. 2 *Haw.* 137.

If a prisoner for felony break the gaol, this seems to be a negligent escape in the gaoler, because there wanted either that due strength in the gaol, that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it; and therefore it is lawful for the gaoler to hamper them with irons to prevent their escape: for if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *H. H.* 601.

4. It seems to be generally agreed, that a voluntary escape suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. 2 *Haw.* 134. Of a voluntary escape.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c.* 159.

Also, a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner, as if he was never so rightfully intitled to such custody; for that the crime is in both cases of the same ill consequence to the publick: and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. 2 *Haw.* 134.

But it seemeth to be clear, that no one is punishable as for felony, for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, altho' in all civil causes, the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape; this, inasmuch as it reacheth to life, is felony only in the gaoler, that was immediately trusted with the custody, and not in the sheriff. 1 *H. H.* 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho' it were such in the gaoler, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his gaoler. 1 *H. H.* 597, 598.

But altho' the felony for which a man is committed, be not within clergy; yet the person who voluntarily suffers him to escape, shall have the benefit of clergy. 1 *H. H.* 599.

Escape.

A. Indictment against a constable for an escape.

— THE jurors for our lord the king upon their oath present, that on the — day of — in the — year of the reign of — at — in the county aforesaid, one A. I. of — came before J. P. esquire, then and yet one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; and the said A. J. did, then and there, on his oath, before the same justice, charge, accuse, and give information against one A. O. of — aforesaid in the county aforesaid, yeoman, for a certain misdemeanor, in taking fish out of the pond of — at — in the said county [or, as the offence shall be:] Whereupon the said J. P. the justice aforesaid, did then and there to wit, at — aforesaid, in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law, directed to the constable of — aforesaid, in the county aforesaid, thereby requiring him the said constable to take the body of the said A. O. and bring him before the said J. P. the justice aforesaid, to answer to such matters and things as should be alledged against him, touching the said misdemeanor; Which said warrant, afterwards, to wit, on the same day and year abovementioned, at — aforesaid, in the county aforesaid, was delivered to one A. C. then being constable of — aforesaid, in due form of law, to be executed; by virtue of which said warrant the said A. C. afterwards, to wit, on the said — day of — in the year aforesaid, at — aforesaid, in the said county, did take and arrest the body of the said A. O. and him the said A. O. in his custody for the cause aforesaid, had: Nevertheless, the said A. C. of — aforesaid, in the county aforesaid, yeoman, afterwards to wit, on the said — day of — in the year aforesaid, the duty of his office in that part not regarding, at — aforesaid, in the county aforesaid, unlawfully and negligently did permit the said A. O. to escape, and go at large, out of the custody of him the said A. C. to the great hindrance of justice, in contempt of our said lord the king, and of his laws, and against the peace of our said lord the king, his crown and dignity.

Estray.

And herein also of goods waived.

Estray, what.

1. **E**STRAY is, where any horses, sheep, hogs, beasts, or swans, do come into a lordship, and are not owned by any man. Kitch 23.

Where any horses, sheep, hogs, beasts, or swans] Bees, and other creatures of a wild nature, are not within this description, and therefore not to be reckoned amongst stray goods: nevertheless it seemeth that a swarm of bees, of which the owner hath lost sight, and consequently can make out no property, may be seized for the use of the king, or of the lord of the manor; for it is a maxim of the common law, that such goods whereof no one can claim property do belong to the king; and that which the king hath he may grant

grant to another, and consequently another may prescribe to have the same, within such a precinct or lordship. And therefore it is said, that if any take honey or swarms of bees within the demesns of the lord, it is inquirable in the court baron. *Kitch. 114.*

Swans] Swans that be unmarked and wild (being at large and abroad) may be seized by the sheriff for the use of the king, by his prerogative. *Dalt. Sher. 80.*

Also swans marked and tame may be estrays. *Kitch. 80.* But it seemeth that no other fowl can be estray. *Wood b. 2. c. 2.*

Do come into a lordship] That is, where the goods have no right to be; and therefore an estray cannot be in such place, where the party hath a right of common. *Dalt. Sher. 79.*

And are not owned by any man] Whereupon (as hath been said) the property accrueth to the king; and the cattle of the king cannot be estrays, nor forfeited as such to the lord of the manor. *Kitch 81.*

2. Waif is, where a felon in pursuit waiveth the goods; or where the felon, for fear of being apprehended, thinking that a pursuit was made, having them with him in his possession, fleeth, and waiveth, casteth away, or goeth from the goods: in these cases, they shall be said to be waived in law. But if he hath not the goods with him, when he fleeth being pursued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take them when he will, without any fresh suit. *5 Co. 109. Dalt. Sher. 78.* Waif, what.

But if the thief in his flight waive them, there the goods are forfeited to the king or lord of the liberty by the common law, if the felon upon fresh suit was not attainted at the suit of the owner of the goods: and the reason why waif is given to the king, and that the party shall lose his property in such case, is for default in the owner, that he pursued not freshly to apprehend the felon; for it concerneth the publick that crimes do not remain unpunished, and impunity always encourageth to that which is worse.

And therefore the law hath imposed this penalty upon the owner, that if the thief by his industry and fresh suit be not attainted at his suit, in an appeal of the same felony, he shall lose for his default all his goods which the thief at the time of his flight waived: but if the thief had them not with him when he fled, having peradventure hid them, there no default can be in the party; and therefore they shall not be forfeited, for if he maketh fresh suit after notice of the felony it sufficeth. *5 Co. 109.*

3. Heretofore waifs and strays were the finder's, by the law of nature; and afterwards the king's, by the law of nations. *Dalt. Sher. 79.*

Thus, one as a bailiff or servant to the sheriff seized a horse as an estray to the king's use, and proclaimed him according to law, and after the year and day sold him, and the sheriff accounted for him in the exchequer. *Dalt. Sher. 80.*

But

But now kings have granted this, and such like prerogatives, unto their subjects, within their liberties; so that waifs and strays are in many places the lord's of the franchise where they are found. *Dalt. Sher. 79.*

And therefore waived goods and estrays shall be *seized* by the officer of the king, to the use of the king; or by the officer or bailiff of the lord, who hath such things by grant of the king, or by prescription, to the use of the lord. *Dalt. Sher. 80.*

But if one have a waif, and it be taken out of his manor, he shall have trespass, *without* seizing, and though he do not seize it. *Kitch. 81.*

Pro. claiming
the goods
seiz. ed.

4. It seemeth to be agreed, that waifs and strays ought to be proclaimed in the two next market towns; and that if they are not proclaimed, the owner may take the stray goods again at any time: and it seemeth to be the general tenor of the old books, that they ought also to be proclaimed in the church: which course it seemeth best to follow; to the end that the owner, who in this case is no wrong doer, may have a reasonable mean to come at his goods again; that is to say, that the goods be proclaimed at the least thrice, to wit, in the two market towns next adjoining to the place where they strayed, on the market days respectively, and at the church door on a Sunday, as the people come out of church. *Kitch. 23, 81, 105. Dalt. Sher. 79. Cro. Eliz. 716.*

How waifs or
strays are to be
kept.

5. And they ought to be wreathed; and to be put in some several ground into an open place, and not in any covert or wood, that the owner may have a view of them; for if they be in covert, the property is not changed, tho' they be there a year and a day. *Kitch. 23.*

An estray is not to be used in any manner, except in case of necessity, as to milk a cow, or the like; but not to ride an horse, for within the year and day he hath not any property in him. *Cro. Ja. 147, 8.*

Owner claim-
ing.

6. He who taketh an *estrays*, may keep it until he be satisfied for the finding, keeping, and proclaiming thereof. *Dalt. Sher. 79.*

But the owner (if it be within the year and day) may take it without telling any marks, or making any proof of property; but this may be done upon the trial, if contested. *2 Salk. 686.*

And the lord ought to make a demand of what the amends should be; and then if the party thinks the demand unreasonable, he may tender sufficient amends; and if the lord shall not accept it, this shall be settled by the jury upon trial.

But it is sufficient in this case to tender amends *generally*, without expressing any certain sum. For there is a difference between this case, and that of a tender of amends for trespass. In that of a trespass, if the defendant pleads a tender of amends, he must shew what he tendered; for he must tender a certain sum. And the law puts this difficulty upon him, because he is the wrong doer: But the owner of the stray (as hath been said) is no wrong doer; and it is impossible he should know, how long his beast hath been in the lord's custody, nor how much will make a proper satisfaction. *2 Salk. 686.*

In the case of goods *waived*; the owner may seize them twenty years after, if the lord of the franchise, nor the king seized before; but if they are seized, then they become forfeited to the king or lord of the liberty. *Kitch. 82.*

And

And this forfeiture is not like a stray, where tho' the lord may seize, yet the party who is the owner, may retake them within a year and a day; but here the true owner cannot seize his own goods, tho' upon fresh suit, within the year and day. 1 H. H. 541.

But this is not an absolute loss of the owner's goods, but rather an expedient settled by law, to drive the owner to convict the felon by prosecuting his appeal; and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convicted or attaint, and the fresh suit be inquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 1 H. H. 541.

7. Waifs and strays not claimed within the year and day, are the lord's. Property accruing to the lord, on not claiming. Kitch. 23, 80, 81.

For where the lord hath by a year and a day a beast, and it be cried in the church and markets, the property is changed. Kitch. 80.

That is to say, after he hath had the beast a year and day from the time of the proclamation, and not from the time of the seizure: for after the first proclamation it becometh an estray, but no sooner. 11 Mod. 89.

If the estray within the year estray out of the manor, the lord may chase back the estray unless it be seized by another lord who hath estrays; but if it be seized by such other lord, then the first hath lost all possibility of his gaining the property, and the other lord ought to proclaim it *de novo*. Finch 177. Kitch. 81. Hutt. 67.

Estreit.

1. **ESTREAT** (*extrañum*) is used for the true copy or note of Estreit, what. some original writing of record, and especially of fines and amerciaments, imposed in the rolls of a court, to be levied by the bailiff or other officer.

2. The justices and judges before whom fines or amerciaments shall be, Making out the estreats. shall charge the clerks of the estreats, by their oath to be made, that they make the rolls of such estreats distinctly, by express words, of the cause of the loss, of the term of the year, and the nature of the writ, and betwixt what parties such issues or amerciaments shall be lost, as well in the king's suit, as in the suit of the party. 7 H. 4. c. 3.

3. If recognizances be estreated into the exchequer, because not punctually complied with; yet if the party appears and takes his trial the next Party coming in after the estreat. sessions, or otherwise performs what he was bound to by the recognizance as the case shall be, he may compound for a very small matter in the court of exchequer: because the effect, tho' not the exact form of the recognizance, is complied with. 10 Mod. 278.

4. And in levying, the sheriff shall shew the estreats under the seal of Sheriff's duty in levying. the exchequer, to the party indebted; on pain of treble damages to the party, and fine to the king, on conviction before the justices of the peace, or other justices. 42 Ed. 3. c. 9.

Ectreat.

Form of the ectreat.

_____ **A**N extract of all the issues, fines, amerciements, and recognizances, set, lost, imposed, and forfeited to our sovereign lord the king, at the general quarter-sessions of the peace of our said lord the king, holden at _____ in and for the said county of _____ on _____ the _____ day of _____ in the _____ year of the reign of _____ before _____ esquires, justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, Joseph Robinson, gentleman, clerk of the peace for the county aforesaid, then and there attending :

Of A. O. late of _____ in the said county, labourer, for a trespass and assault at _____ aforesaid in the said county, whereof he is indicted and convicted; and his fine set at five shillings, which he paid to the sheriff in court. _____ l. s. d.
_____ o 5 o

Of A. O. of _____ in the said county, yeoman, because he came not now here to answer to such things as against him, on the part of our said lord the king, should be objected, as by a certain recognizance taken before J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, he undertook. _____ l. s. d.
_____ 10 o o

Of A. S. of _____ in the said county, yeoman, one of the pledges of said A. O. because he had him not to answer as above _____ 5 o o

Of B. S. of _____ in the said county, yeoman, the other of the pledges of the said A. O. for the like _____ 5 o o

Evidence.

I. Of evidence in general.

II. Of written evidence.

III. Of the evidence of witnesses.

IV. Of process to cause witnesses to appear.

V. Of the manner of giving evidence.

I. Of evidence in general.

Evidence,
what.

EVIDENCE in legal understanding, doth not only contain matters of record, as letters patents, fines, recoveries, inrollments and the like, and writings under seal, as charters and deeds, and other writings without seal, as court rolls, accounts, and the like; but in a larger sense it containeth also the testimony of witnesses, and other proofs to be produced and given, for the finding of any issue joined between the parties. And it is called *evidence*, because thereby the point in issue is to be made evident to the jury. 1 Inst. 283.

2. It is a general rule in all cases, civil and criminal, that the best evidence that may be had, or that the nature of the thing will bear, is to be given: and it is upon this reason, that a copy of the record is admitted, because one cannot have the record itself; but a copy of a copy will not do. *Law of Evid.* 286. The best evidence is required.

3. Many times juries, together with other matter, are much induced by presumptions; whereof there are three sorts, violent, probable, and light or temerary. Violent presumption many times amounts to full proof; as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house, with a bloody sword, and no other man was at that time in the house. Probable presumption moveth little. But light or temerary presumption moveth not at all. *1 Inst.* 6. Presumptive evidence,

If all the witnesses to a deed be dead (as no man can keep his witnesses alive, and time weareth out all men) then violent presumption, which stands for a proof, is continual and quiet possession; altho' the deed may receive credit from a comparing of seals, writing, and the like. *1 Inst.* 6.

4. The common law did not require any certain number of witnesses, for the trial of any crime whatsoever. *2 Haw.* 428. What number of witnesses are required.

And before a justice of the peace in divers cases, one witness is sufficient to convict an offender; the same being directed by special statutes.

But in case of high treason, whereby corruption of blood shall be made, no person shall be attainted, but upon the oaths of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason. *Eng. stat. 7 W. 3 c. 3.*

In like manner, in those courts which proceed by the rules of the civil law, as the spiritual court, and the courts of equity, two witnesses are generally required: and the reason why the civil law requires two witnesses is, because their trial is by witnesses, and not by a jury of twelve men. But where the trial is by verdict of twelve men, there the judgment is not given upon witnesses, or other kind of evidences, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict. *1 Inst.* 6 b. *Plowd.* 12 a.

By *7 Will.* 3. c. 12. Devises of lands shall be attested by three witnesses at the least.

II. Of written evidence.

1. Acts of parliament relate either to the kingdom in general, and are therefore called *general* acts of parliament; or only to the concerns of private persons, and are thence called *private* acts of parliament. *Theory of Evid.* 2. Act of Parliament.

A general act of parliament is taken notice of by the judges and jury, without being shewed; and hence it is that it hath been said, that the printed statute book is good evidence of general acts of parliament; not that the printed statutes are the perfect and authentic copies of the records themselves, but every person is supposed to know the law; and

Evidence.

therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already. *id.* 2. 8.

But in the case of private acts of parliament the printed statute book is not evidence, tho' reduced into the same volume with the general statutes; but the party ought to have a copy compared with the parliament roll; for they are not considered as already lodged in the minds of the people. *id.* 8.

However, a private act of parliament, that is in print, which concerns a whole county (as the act of Bedford levels), or a large body of people (as the whole clergy in general), hath been allowed to be given in evidences without comparing it with the record; and these things are the rather admitted, because they gain some authority from being printed by the kings printer; and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. *id.* 8.

Records of
courts.

2. Records of the king's courts prove themselves, and cannot be proved by witnesses. But copies of them must be proved by witnesses, and then they are good evidence. No rasure or interlining shall be intended in them. But the surest way is, to exemplify a record under the great seal, or at least under the seal of the court. 10 Co. 92.

And nothing shall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Read. Evid.*

Rolls of courts
not of record.

3. There are also other publick matters that are not records, as court roll's, and transactions in chancery; and of these, copies may be given in evidence. *Theory of Evid.* 22, 23.

The reason why the proceedings in chancery are not records is this, because they are not the precedents of justice; for the judgment there is, according to equity and good conscience, and not according to the laws and customs. And the reason why any record is of validity and authority is, because it is a memorial of what is the law of the nation; now chancery proceedings are no memorials of the laws of *England*, because the chancellor is not bound to proceed according to the laws. *id.* 23.

The rolls of a court baron are evidence; for they are the publick rolls, by which the inheritance of every tenant is preserved: and they are the rolls of the manor court, which was antiently a court of justice relating to all property within the district. *id.* 43.

4. Depositions of witnesses may be read when the witness is dead, but not when the witness is living; for whilst the witness is living, they are not the best evidence the nature of the thing is capable of. *Theory of Evid.* 30.

Yet they may be read when a witness is sought and cannot be found; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *id.*

So if it is proved that a witness was subpoenaed, and fell sick by the way; for in this case likewise, the deposition is the best evidence that can be had, and that answers what the law requires. *id.*

Depositions.

But a deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross

cross examine the witness; and it is against natural justice, that a man should be concluded by proofs in a cause to which he was not a party. For this reason, depositions in chancery shall not be read for or against the defendant upon an information or indictment, for the king was no party to the suit. *id.*

Yet this rule admits of some exceptions; as particularly, in all cases where hearsay and reputation are evidence; for undoubtedly what a witness, who is dead, hath sworn in a court of justice, is of more credit than what another person swears he hath heard him say. So a deposition taken in a cause between other parties, will be admitted to be read, to contradict what the same witness swears at a trial. *id.* 30, 31.

It is a general rule, that depositions taken in a court not of record, shall not be allowed in evidence elsewhere. So it hath been holden in regard to depositions in the ecclesiastical court, tho' the witnesses were dead. So where there cannot be a cross examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence. *id.* 33, 34.

But it seems to be settled, that the examination of an informer taken upon oath, and subscribed by him, either before a coroner upon an inquisition of death, or before justices of the peace, in pursuance of the statutes of *Philip & Mary* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the satisfaction of the court, that such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the coroner or justice, without any alteration whatsoever.

2 *Haw.* 429.

But it hath been adjudged, that it is not sufficient to authorize the reading of such examination, to make oath that the prosecutors have used all their endeavours to find the witness, but cannot find him. 2 *Haw.* 430.

But it is said to have been adjudged, by the court of king's bench, in the 7 *W.* (1 *Salk.* 281.) upon advice with the justices of the common pleas, on an indictment for a *libel*, that depositions taken before a justice of the peace, relating to the fact, could not be given in evidence, tho' the deponent were dead; and that the reason why such depositions may be given in evidence in *felony*, depends upon the statutes of *Phil. & Mar.* and that this cannot be extended farther than the particular case of felony. But in the report of this case, 5 *Mod.* 165. it is said, that the reason why such depositions could not be read, was because the defendant was not present when they were taken, and therefore had not the benefit of a cross examination. 2 *Haw.* 430.

Antiently, depositions taken in *perpetuam rei memoriam* were not published till after the death of the witnesses, because they were no evidence while the witnesses were living; but this practice was found very inconvenient, because thereby witnesses became secure in swearing whatever they pleased, inasmuch as they never could be prosecuted for perjury. *Theory of Evid.* 32.

What

What a man himself, who is living, hath sworn at one trial, can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear false at one trial, he may do the same at another on the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shews that what he swears is not from any undue influence. But if a man hath sworn at one trial different from what he hath sworn at another, this is good evidence as to his discredit. *id.* 35.

Verdict.

5. No verdict shall be given in evidence, but between such who were parties or privies to it; because otherwise, a man would be bound by a decision, who had not the liberty to cross examine: and nothing can be more contrary to natural justice, than that any body should be injured by a determination, that he, or those under whom he claims, was not at liberty to controvert. *Theory of Evid.* 18, 19.

And a verdict will not be admitted in evidence, without likewise producing a copy of the judgment founded upon it; because it may happen, that the judgment was arrested upon a new trial granted. But this rule doth not hold, in the case of a verdict on an issue directed out of chancery; because it is not usual to enter up judgment in such case; and the decree of the court of chancery is equally proof that the verdict was satisfactory, and stands in force. *id.* 21.

Sentence or
final judgment.

6. A decree in chancery may be given in evidence between the same parties, or all claiming under them; for their judgments must be of authority in these cases, where the law gives them a jurisdiction: for it would be very absurd, that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. *Theory of Evid.* 36, 37.

And note, wherever a matter comes to be tried in a collateral way, the decree, sentence or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter: and in case the determination is final in the court, of which it is a decree sentence or judgment, such decree, sentence or judgment will be conclusive in any other court having concurrent jurisdiction. *id.* 37.

Deed.

7. Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands; which was opposed by the other side; but admitted by the court, who said, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. *Vin. Evid. Q. a. 9. E. 11 G. 2. Porter and Gordon.*

In cases where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like; the law, in such cases of necessity, allows them to be proved by witnesses. *Jenk. 19. Wood b. 4. c. 4.*

If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it; and therefore the defendant having torn his own note signed by him, a copy sworn was admitted to be good evidence to prove it. *L. Raym. 731.*

And it was holden for law, by *Vernon* judge of assize, that where the defendant himself hath the deed which concerns the land in question, and will
not

not produce it; in such a case, the copy thereof will be permitted to be given in evidence; and so it was, and the witness swore it once in his hand, and that the copy produced was a true copy of the deed, and himself did examine it. *Clayt.* 15.

And in such like cases, it is said, that if the party has no copy, he may produce an abstract, nay even give parol evidence of the contents. And where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence without being proved to be true; because in such case it may be impossible to give better evidence. *Theory of Evid.* 54.

8. An indenture to guide the uses of a common recovery, was offered in evidence, but the seals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402. Writing with the seal torn off

To prove the taking of an oath, in the act of uniformity, a certificate was produced that had only a small piece of wax upon it. By *Twisden*; if it were sealed, tho' the seal was broken off, yet it may be read, as we read recoveries after the seal broken off; and he said, he had seen an administration given in evidence after the seal broken off, and so wills and deeds. *11 Mod.*

11. *M.* 21 C. 2. *Clerk and Heath.*

9. If upon collateral issue, it is to be proved, that such a one was justice of the peace, baronet, or the like; common reputation is sufficient proof, without shewing the commission, or letters patent of the creation. *Tr. per pais* 347. Letters patent.

10. The copy of the probate of a will is good evidence, where the will itself is of chattels; for there the probate is an original taken by authority, and of a publick nature; otherwise, where the will is of things in the realty; because in such case the ecclesiastical courts have no authority to take probates; therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. *3 Salk.* 154. Copy of a will.

For the copy of an original is evidence, wherever the original is evidence, if proved a true copy; but the copy of the probate of a will of lands is no evidence, because the probate in such case is not an original taken by authority, and therefore is only a copy of a copy. *Comb.* 337.

11. So the copy of the court roll of a manor, is good evidence; as also the copy of a church register, the copies of town books, and the like; for where the original itself is good evidence, the immediate copy thereof is also good evidence. *Skin.* 584. *L. Raym.* 154. Other copies.

And generally, wherever an original is of a publick nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. *3 Salk.* 154. *H. 8 W. Lynch and Clarke.*

On a warrant to a constable to distrain goods by virtue of an act of parliament; the constable makes distress, and returns the overplus to the offender, but keeps the warrant. Resolved, that a copy of the warrant in this case will be good evidence. *6 Mod.* 83. *M.* 2 An. *Morley and Staker.*

12. An inquisition *post mortem* is evidence, but not conclusive. *2 T. Jones.* Inquisition post mortem.

224. *M.* 34 C. 2. *Earl of Thanet v. Foster.*

13. The entry of the names and titles of persons in a church book either for marriages or births is evidence, but not conclusive evidence of the marriage. Parish register.

riage or birth of any persons, unless the identity of the persons (by such entries intended) is fully proved, and also strengthened with circumstances, as cohabitation, the allowance of the parties themselves, and the like. *Vin. Evid.* (A. b. 15.) 11.

Heralds books. 14. Rolls or ancient books in the heralds office, are evidence to prove a pedigree: but an extract of a pedigree, proved to be taken out of records, shall not; because such extract is not the best evidence in the nature of the thing, as a copy of such records might be had. *Theory of Evid.* 45.

Bounder roll. 15. An old terrier or survey of a manor, whether ecclesiastical or temporal, may be given in evidence; for there can be no other way of ascertaining the old tenures or boundaries. *Theory of Evid.* 44.

Terrier. 16. A terrier of glebe is not evidence for the parson, unless signed by the churchwardens, as well as the parson; nor then neither, if they be of his nomination: and tho' it be signed by them, yet it seems to deserve very little credit, unless it is likewise signed by the substantial inhabitants. But in all cases, it is certainly strong evidence against the parson. *Theory of Evid.* 45.

Indorsement of interest on a bond. 17. *M. 11 G. Serle* and lord *Barrington*. The indorsement on a bond by the obligee, of payment of interest, was allowed to be given in evidence by his administrator, to take off the presumption from the length of time. *L. Raym.* 1371.

Shop book. 18. By the 7 *J. c.* 12. No tradesman nor handicraftsman shall be allowed to give his shop book in evidence, on an action for money due for wares delivered, or for work done, above one year before the action brought. But this not to extend to any trading between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for any thing directly falling within the compass of their mutual trades and merchandize.

In the case of *Pitman* and *Maddox*, 11 *W.* A shop book was allowed for evidence, it being proved that the servant that writ the book was dead, and this was his hand, and he accustomed to make the entries, and no proof was required of the delivery of the goods; and *Holt Ch. J.* said, it was as good evidence as the proof of a witnesses's hand to an obligation; and he held, that tho' the statute of the 7 *J.* says, a shop book shall not be evidence after the year, yet it is not of itself evidence within the year. 2 *Salk.* 690.

Book of accounts. 19. A man's book of accounts is no evidence for the owner of the book, but for the adverse party; for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per pais* 348.

Private book of entries. 20. In the case of the *Queen* and *Mead*, the defendant, and eight others, were incorporated under an act made 39 *El.* by the name of the surveyors of the highways at *Ailesbury* in the county of *Bucks*, and were trustees of a charity called *Bedford's gift*. An information was preferred against the defendant, for executing this office, being an office of trust, without having taken the oaths, contrary to the 25 *C. 2. c. 2.* To which he pleaded not guilty. And now it was moved for a rule, that the prosecutor might have two books produced, which these surveyors kept, in which they entred their elections, and also their receipts and disbursements; and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. But it was denied by the court; because they are perfectly

fectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution. L. Raym. 927.

21. A copy of an inscription on a grave stone, hath been allowed to be given in evidence Inscription on a grave stone.

22. The examination of an almanack, that such a day of the month was Almanack. Sunday, was ruled to be sufficient; and that a trial of this by a jury is not necessary, altho' it is a matter of fact. Cro. Eliz. 227.

And the reason why the kalendar in an almanack is allowed as evidence seemeth to be, because the said kalendar is part of the book of common prayer, and consequently established by act of parliament.

23. And an almanack wherein the father had writ the day of the nativity of his son, was allowed as evidence to prove the nonage of the son. Father's entry of the child's birth. Raym. 84.

24. Camden's Britannia was offered in evidence, to prove a particular custom, but refused; for the court held, that a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it; but not to prove a particular right or custom: So in the case of St. Katherine's hospital, Hale Ch. J. allowed a chronicle to be evidence of a particular point of history in Edward the third's time: So a year book may be evidence, to prove the course of the court. And in this case it was admitted, that heralds books are good evidence as to pedigrees, and parish registers as to births and marriages, upon the nature of the thing. But in the exchequer, the question being whether the Abbey de Fontibus was an inferior abbey or not, Dugdale's Monasticon was refused for evidence, because the original records might be had in the augmentation office. 1 Salk. 281. 7 W. Stainer and the Burgeses of Droitwich. General history.

So in the case of Cockman and Mather, E. 13 G. On a trial at bar, concerning the right of visiting University college in Oxford, one of the issues was, whether king Alfred was founder. And the counsel for the plaintiff would have given in evidence several historians as to this point. But the chief justice declared, that such evidence is never admitted, unless in proof of a point concerning the publick government. And the evidence was not allowed. Barnard. 14.

25. It seems to have been generally holden, since the reversal of the attainder of Algernon Sidney, that similitude of hands is not evidence in any criminal case, whether capital or not capital. 2 Haw. 431. L. Raym. 39. Similitude of hands.

And, generally, it is said, that similitude of hands is no evidence; but saying that he was well acquainted with his writing, and knew it to be the party's, is evidence. Vin. Evid. (T. b. 48.) 14.

And in general cases, the witness should have gained his knowledge from having seen the party write; but under some circumstances that is not necessary: as where the hand writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence, would be admitted to prove it, tho' he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write; as where a parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish books, in which was the same person's name, was

permitted to swear to the similitude of the hand writing, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. *Theory of Evid.* 25, 26.

III. Of the evidence of witnesses.

Confession.

1. It seems that the confession of the defendant, whether taken on an examination before justices of the peace, in pursuance of the 1 & 2 P. & M. c. 13. or 2 & 3 P. & M. c. 10. upon a bailment or commitment for felony, or taken by the common law upon an examination for other crimes not within those statutes, or in discourse with private persons, hath always been allowed to be given in evidence, against the party confessing, but not against others. 2 *Haw.* 429.

But wherever a man's confession is made use of against him, it must be all taken together, and not by parcels. 1 *Haw.* 429.

Witness of kin
to the party.

2. It is to be observed, that there be many circumstances that disable a juror, that are not sufficient exceptions against a witness: Thus the exception of kindred, is a good cause of challenge against a juror, but not against a witness; therefore the father may be a competent witness for or against his son, or the son for or against his father. These and the like exceptions may be to the credit or credibility of the witness, but are not exceptions against his competency. 2 *H. H.* 276.

For, that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony; is left to the jury. 2. Exceptions to the competency of the witness, which do exclude him from giving his testimony, and of these exceptions the court is the judge. 2 *H. H.* 276, 277.

Witness in-
famous.

3. It seems agreed, that an attainder, judgment, or convictions of treason, felony, piracy, præmunire, perjury, or forgery on 5 *El.* and also a judgment in attain for giving a false verdict, or in conspiracy at the suit of the king; and also judgment for any heinous crime to stand in the pillory, or to be whipped or branded, are good causes of exception against a witness, while they continue in force. 2 *Haw.* 432. *Theory of Evid.* 107.

But it is agreed, that no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court. 2 *Haw.*

Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. 2 *Haw.* 433.

And a man shall not be permitted to swear, that he was suborned and perjured. *St. Tr. V.* 3. 427.

And lord Coke says, a witness alledging his own infamy or turpitude, is not to be heard. 4 *Inst.* 279.

Thus a wife was disallowed to be a witness, to prove her husband had no access to her in a case of bastardy. *Seff. Cases. V.* 2. 175. *K. and Reading.* M 8 G. 2.

It seems clear at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 433.

A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness. 2 *Haw.* 433.

And it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder restores the party to his credit. 2 *Haw.* 433.

4. It seems agreed to be a good exception, that a witness is an infidel; that is, as it seemeth, that he believes neither the old nor new testament to be the word of God, on one of which our laws require the oath should be administered. 2 *Haw.* 434. Witness an infidel.

5. Want of discretion is a good exception against a witness; on which account alone it seems, that an infant may be excepted against. 2 *Haw.* 434. Witness wanting discretion.

But if an infant be of the age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear that he hath a competent discretion, he may be sworn. 2 *H. H.* 278.

And in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practised upon children. 2 *H. H.* 279, 284. *Str.* 700.

6. It seems an uncontested rule in all cases, that it is a good exception against a witness, that he is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw.* 433. Witness interested.

Thus in an information upon the statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be witness in his own cause, and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst.* 6.

Thus also an attorney ought not to be examined against his client, because he is obliged to keep his secrets: but of his own knowledge before retainer, he may be examined as a witness, if served with a subpoena. *Wood b. 4. c. 4.*

But upon an indictment for battery, or the like, the party grieved may be a witness against the defendant, because the prosecution is at the suit of the king. *Wood. b. 4. c. 5.*

And in many criminal cases, from the necessity of the thing, interested persons are allowed as witnesses. As where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be intitled to restitution; and yet his evidence is admitted. So in removing an indictment by certiorari from the sessions to the king's bench; tho' the prosecutor in that case, if the defendant be convicted, is intitled to his costs, yet he is allowed as a witness. So where a man, in case of conviction of the offender for a robbery, will be intitled to a 40*l.* reward; yet his evidence shall be received. And by *Parker* chief justice: as to the cases where a 40*l.* reward is given, they admit of this answer; that the intention of those acts would be quite defeated, if so be the reward should take off the evidence. The same answer may serve to the cases put up-

on an indictment of felony for stolen goods; and where the indictment is removed by certiorari: for none in the first case but the owner can prove the property of the goods; and in the second, if the giving of costs should take off the evidence of the prosecutor, the act of parliament designed to discountenance the removing of suits by certiorari, would give the greatest encouragement to them that is possible. 10 *Mod.* 193. *M.* 12 *An. Q.* and *Muscott*.

Also it seems agreed, that it is no good exception against a witness, that he has a maintenance from the king; for every one may maintain his own witnesses. 2 *Haw.* 434.

Thus also, one commoner may be a witness for another claiming common, because in effect it charges himself; that is to say, he admits another to have common with himself. (But if the prescription be, that all the inhabitants of such a place ought to have common there, one of the inhabitants cannot be a witness, to prove that another of the said inhabitants ought to have common there, because in effect he would swear to give himself a right of common there. *L. Raym.* 731.

A trustee may be a witness, if he hath released his trust; but not if he hath conveyed it over. *Sid.* 315. *M.* 18 *C.* 2. *Stephens* and *Gerrard*.

An heir at law may be a witness concerning the title to the land, but the remainder man cannot, for he hath a present interest, but the heirship is a mere contingency. 1 *Salk.* 283. *M.* 10. *W. Smith* and *Blackham*.

In evidence to a jury at bar, a special issue by rule of court was directed to try the custom of lady *Percie's* manor of *Westwood* in *Cumberland*, whether fines on the tenants on their lord's death, be due to the heirs or successors of the lord, during his minority; the defendant excepted to the steward, because he had a fee on admission, but it was not allowed, and he was sworn. 3 *Keb.* 90.

A witness's laying a wager in the cause, is no hindrance to his being a witness; for the other has an interest in his evidence, which he cannot deprive him of. *Farest.* 31. *Str.* 652.

If a person apprehends himself to be interested, though in strictness of law he is not, yet he ought not to be sworn: as where the witness for the plaintiff apprehended that if the plaintiff should recover, he would remit a claim of some money which he (the plaintiff) had upon this witness; but if he should not recover, he would not remit it; although in strictness of law, his recovering or not recovering in that case would not alter the claim: or as in case where the witness owned himself to be under an honorary, though not under a binding engagement, to pay the costs. *Str.* 129.

Husband and
wife.

7. It seems agreed, that the husband and wife being as one and the same person in affection and interest, can no more give evidence for one another, in any case whatsoever, than for themselves; and that regularly the one shall not be admitted to give evidence against the other, nor the examination of the one be made use of against the other, by reason of the implacable dissention which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme

extreme hardship of the case. Yet some exceptions have been allowed in cases of evident necessity; as in the lord *Audley's* case, who held his wife, while his servant by his command ravished her; or where a man is indicted for a forcible marriage on the statute of the 3 *H.* 7. or where either a husband or wife have cause to demand sureties of the peace against the other. 2 *Haw.* 431, 432.

8. It seems agreed, that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him. 2 *Haw.* 432. Judge or juror being a witness.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr. Evid. A.* 2.

9. It hath been long settled, that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders. 2 *Haw.* 432. Witness being an accomplice.

Also it hath been often ruled, that accomplices who are indicted, are good witnesses for the king, until they be convicted. 2 *Haw.* 432.

Also it hath been often adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the others. 2 *Haw.* 432.

It hath been also adjudged, that where three persons are sued in three several actions on the statute for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another. 2 *Haw.* 432.

10. It seems agreed, that it is no good exception against a witness, that he is an alien, or villein, or bondman. 2 *Haw.* 434. Witness an alien or bondman.

11. There were two witnesses to a deed, and one of them was blind. It was ruled by *Holt* chief justice, that such deed might be proved by the other witness, and read; or might be proved without proving that this blind witness is dead; or without having him at the trial, proving only his hand. *L. Raym.* 734. *Wood and Drury.* *Warwick assiz.* 1699. Witness blind.

12. If a witness is beyond the sea, it is usual to prove his hand, and that he is beyond the sea. *Vin. Evid.* [T. b. 48.] 13. Witness over sea.

13. There were two witnesses to a bond; one in *Africa*; and the other in *Bedlam*, mad: on an order to prove an exhibit *viva voce* in chancery, a witness proved these facts, and their hands to the bond as if dead. *T.* 5 & 6 *G.* 2. *Vin. Evid.* [T. b. 48.] 12. Witness become insane.

14. If a witness to a deed is dead; it is sufficient to prove the witness's hand, without proving the hand of the party. By *Pratt* chief justice, *T.* *Vac.* 1719. *Vin. Evid.* [T. b. 48.] 10. Witness dead.

The sayings of a dead man are not to be given in evidence to prove a particular fact; they are only to be admitted in proof of general usages and customs; but as for a particular fact, lying in the knowledge of a particular person, by his death the evidence is lost. *St. Tr.* *V.* 5. 456.

And

And it hath been agreed, that the evidence given by a witness at one trial, cannot in the ordinary course of justice be made use of against a defendant, on the death of such witness at another trial. 2 *Haw.* 430.

In the case of murder, what the deceased declared after the wound given, may be given in evidence. *Vin. Evid.* [A. b. 38.] 11.

But where such declaration is reduced into writing, the writing itself must be produced, and not evidence thereof given *viva voce.* *id.* 12.

Hearsay.

15. It is a general rule, that hearsay is no evidence; for no evidence is to be admitted but what is upon oath; and if the first speech was without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. But tho' hearsay ought not to be allowed as direct evidence, yet it may be allowed in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. So where the issue is on the legitimacy of a person, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married, for the presumption arising from the cohabitation is either strengthened or destroyed by such declarations, which altho' not to be given in evidence directly, yet they may be assigned by the witness as a reason for his belief one way or other. So hearsay is good evidence to prove who was a man's grandfather, when he married, what children he had, and the like, of which it is not reasonable to presume that there is better evidence. So to prove that a man's father or other kinsman beyond the sea is dead, the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. So in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation: and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. *Theory of Evid.* 111, 112.

IV. Of process to cause witnesses to appear.

Two ways of causing witnesses to appear.

1. The compulsory means to bring in witnesses, are of two kinds. 1. By process of *subpoena* (A) issued in the king's name, by the justices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal cases), the justices that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial, bind over (B) the witnesses to appear at the sessions, and in case of their refusal either to come, or to be bound over, may commit them for their contempt in such refusal. 2 *H. H.* 282.

2. But

2. But that which is a great defect in this part of judicial administration, is, that there is no power to allow witnesses their charges in criminal cases; whereby many times poor persons grow weary of attendance, or bear their own charges therein, to their great hindrance and loss. 2 H. H. 282.

Charges of witnesses.

By the act of 3 Geo. 3. c. 28. *Whereas many persons accused of and guilty of treason and felony escape the punishment due to such crimes, by the poverty of their prosecutors, who actually forfeit their recognizances rather than undergo the loss of their labour, and the unavoidable expence they must be at by attendance at the assizes: if the judges of assizes and general goal delivery, in any of the counties in this kingdom, shall recommend such persons so attending to prosecute as proper objects, to have an allowance for their time and avocation from their labour, it shall be lawful for the grand juries of the respective counties to present any sum, not exceeding two shillings per day, for such persons as shall be so detained from their labour and business, and necessarily attending to prosecute. Sect. 19.*

3. Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum*, to give his evidence. St. Tr. V. 2. 580. V. 4. 37.

Where a witness is a prisoner in execution.

4. One was subpoenaed *ad testificandum*, and prayed a privilege from being arrested, which was granted; and by the court, it will supersede an arrest upon mean process, but not upon an execution; yet the sheriff in that case may be committed for his contempt. *Nevil's case*, 15 C. 2. Tr. per p. 310.

Witness how far privileged against an arrest.

In the case of *Wyat and Winkford*, 2 G. 2. A motion was made for an attachment against a person, for not attending at the assizes to give his evidence, being subpoenaed, and having received one guinea for his charges, and being promised to have one guinea a day while there, and his charges paid. And a rule was made to shew cause. And afterwards cause was shewed, that an attachment ought not to go, but the party injured had his action upon the statute of *Eliz.* but the court thought, that it was a good foundation for an attachment, the disobedience to the subpoena being a contempt to the court; and tho' an action might be brought on the statute, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witnesses not attending frequently upon trials, at which they were subpoenaed to appear and give evidence. And therefore the rule was made absolute. L. Raym. 1529.

Penalty of a witness not appearing.

In the case of *Small and Whitmill*, M. 10 Geo. 2. It was moved for an attachment against a witness, for not attending a trial at the sittings. But it appearing that the witness was not personally served with the subpoena ticket (it being delivered to his servant, who said he would carry it to him, and going away, came again and said he had done so); and it appearing that one shilling only was left with the ticket, which the court did not deem a sufficient tender for his expences; the attachment was denied.

E. 14 G. 2. *Chapman and Peinton*. A witness was served with a subpoena at *Chester*, to attend the sittings at *Guildhall*, and two guineas were tendered by the person who served it, and being objected to as too little, he

he declared he would give no more. The witness not coming up, an attachment was moved for; but on shewing cause was discharged: the court saying it was too little, and that the witness is not obliged to trust to the court's allowing him more when he comes to the book; for perhaps the party may not call him, and then it may be difficult for him to get home again: that this way of punishing as for a contempt was new, and practised only in this court: the common pleas not doing it to this day, but leaving the party to his remedy on the 5 *El. c. 9.* and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the question, whether the non-attendance was thro' obstinacy or not. *Str. 1150.*

And, by the court, in the case of *Hammond and Stewart, H. 8 G.* the witnesses ought to have a reasonable time to put their affairs in order, that their attendance upon the court may be as little prejudice to themselves as possible. *Str. 510.*

In criminal cases, if a witness hath been bound over, and do not appear; he shall forfeit his recognizance.

V. Of the manner of giving evidence.

Which party shall begin the evidence.
Evidence to be upon oath.

1. He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence. *Litt. 36.*

2. The evidence both for and against a prisoner, ought to be upon oath.

And if a peer is produced as a witness he ought to be sworn. 3 *Keb. 61.*

Lord *Preston* was committed by the court of quarter sessions, for refusing to be sworn to give evidence to the grand jury on an indictment of high treason; and on his being brought by *habeas corpus* into the king's bench, *Holt. Ch. J.* said, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed. 1 *Salk. 278.*

But a quaker's affirmation in all cases not being criminal, shall be allowed as evidence, without an oath; but in criminal cases his affirmation shall not be allowed. 7 & 8 *W. c. 34.*

Must be positive.

3. It is no satisfaction for a witness to say, that he thinks or persuades himself; and this for two reasons, by *Coke* chief justice: 1. Because the judge is to give absolute sentence, and ought to have more ground than thinking. 2. Because judges, as judges, are always to give judgment *secundum allegata et probata*, notwithstanding that private persons think otherwise. *Dyer 53.*

Witnesses may be examined apart.
The prisoners presence.

4. The court may indulge a prisoner in examining the witnesses apart, but he cannot demand it of right. *St. Tr. V. 4. 9.*

5. In cases of life, no evidence is to be given against a prisoner, but in his presence. 2 *Haw. 428.*

Witnesses cannot testify a negative.

6. In every issue, the affirmative is to be proved. A negative cannot regularly be proved; and therefore it is sufficient to deny what is affirmed, until it be proved; but when the affirmative is proved, the other side may contest

contest it with opposite proofs; for this is not properly the proof of a negative, but the proof of some proposition totally inconsistent with what is affirmed: as if the defendant be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, then he may prove a proposition inconsistent with the charge, as that he was at another place at the time, or the like. *Theory of Evid.* 116, 117.

But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. Therefore, in an information against lord *Halifax* for refusing to deliver up the rolls of the auditor of the exchequer; the court of exchequer put the plaintiff upon proving the negative, namely, that he did not deliver them; for a person shall be presumed duly to execute his office, till the contrary appear. *id.* 117.

7. A prisoner may not call witnesses to disprove what his own witnesses have sworn. *St. Tr. V. 2.* 764, 792.

A man shall not disprove his own witnesses whether a witness may read his evidence.

8. A witness shall not be permitted to read his evidence, but he may look upon his notes to refresh his memory. *St. Tr. V. 4.* 45.

9. A witness shall not be cross examined, till he has gone thro' the evidence for the party on whose side he was produced. *St. Tr. V. 2.* 792.

When he may be cross examined.

10. It hath been admitted, that in order to shew a variance in the evidence, a deposition taken by a witness before a justice of the peace, may at the prisoner's desire be read at the trial, in order to take off the credit of the witness, by shewing a variance between such depositions, and the evidence given in court. And for the same reason it seems agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may also be given in evidence to invalidate his testimony at the second trial. *2 Haw.* 430.

Variance.

11 The counsel of that party which doth begin to maintain the issue, ought to conclude. *Tri. p. pais* 220.

Which party shall conclude.

A. Subpœna to give evidence.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To A. B. C. D. and E. F. greeting: We command you, and every of you, that all business being laid aside, and all excuses whatsoever ceasing, you do in your proper persons appear before our justices assigned to keep the peace in our county of ——— and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the general quarter sessions of the peace, to be bolden at ——— in and for the said county, on the ——— day of ——— at the hour of ten in the forenoon of the same day, to testify the truth, and give evidence on behalf of A. J. gent: of the parish of ——— in the said county, against A. O. in a case of a trespass. And this you are in no wise to omit, nor any of you to omit, on pain of one hundred pounds. Witness Sir James Lowther, baronet, the ——— day of ——— in the ——— year of our reign.

Note; There may be four witnesses put in one subpœna.

Evidence.

A subpœna ticket.

To Mr. A. W.

BY virtue of his majesty's writ of subpœna to you directed, and herewith shewn to you, you are personally to be before his majesty's justices of the peace for the county of _____ at the general quarter sessions of the peace to be holden for the said county, at _____ in the said county, on _____ the _____ day of _____ next, to testify the truth, and give evidence on behalf of J. A. gent. of the parish of _____ in the said county, against A. O. in a case of trespass. And this you are not to omit, upon pain of one hundred pounds. Dated this _____ day of _____ 1763.

By the Court.

C.

B. Condition of a recognizance to appear and give evidence.

THE condition of this recognizance is such, that if the above-bound A. W. shall personally appear at the next general quarter sessions of the peace to be holden at _____ in and for the said county, and then and there give such evidence as he knoweth, upon a bill of indictment to be exhibited by A. I. of _____ yeoman, to the grand jury, against A. O. late of _____ in the said county, yeoman, for the feloniously taking and carrying away _____ the property of _____ and in case the said bill be found a true bill, then if the said A. W. shall then and there give evidence to the jurors that shall pass on the trial of the said A. O. upon the said bill of indictment, and not depart thence without leave of the court, then this recognizance to be void, otherwise of force.

Examination.

IF a felony is committed, and one is brought before a justice upon suspicion thereof and the justice finds upon examination that the prisoner is not guilty; yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial. *Dalt. c. 164.*

In order to which bail or commitment, the examination and information of the parties must first be taken, according to the following statutes:

Two or more justices (1 Q.) or one of the said justices, before they bail a person apprehended for felony (if the offence is bailable) shall take his examination (A) and the information (B) of them that bring him, of the fact and circumstances thereof, and the same or as much thereof as shall be material to prove the felony, shall put in writing; which examination they shall certify (together with the indictment) at the next general gaol delivery,

Examination.

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livery, to be holden within the limits of their commission. 10 Car. 1. Sess. 2. c. 18 sect. 4.

And they shall have power to bind by recognizance (C) all such as do declare any thing material to prove the offence, to appear at the next general gaol delivery, to be holden within the county where the trial shall be, then and there to give evidence against the party; and shall certify such recognizance in like manner. §. 5.

And if they offend in any thing herein, they shall be fined by the justices of gaol delivery. id.

Shall take his examination] And in order thereunto, if by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. *1 H. H. 585.*

But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time. 2 Haw. 119.

But the examination of the person accused, ought not to be upon oath. 1 H. H. 585.

But if upon his examination he shall confess the matter, it shall not be a misfeasance that he subscribe his name, or mark to it. Dalt. c. 164.

Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others. 1 H. H. 585. 2 Haw. 429.

Information of them that bring him] Or of other witnesses; whom the justice may bring before him by his warrant (D) for that purpose. *1 H. H. 586. Dalt. c. 164.*

And this information must be upon oath. Dalt. c. 164. 1 H. H. 586.

And therefore if a quaker is witness, his affirmation must not be taken in this case; for by the 19 G. 2. cap. 18. §. 3. it is provided, that no quaker shall be examined for or against any person in any criminal cause, unless it be upon oath.

And the said information being upon the trial sworn to be truly taken by the justice or his clerk, may be given in evidence against the prisoner, if the witnesses be dead and not able to travel. 1 H. H. 586.

Or as much thereof as shall be material to prove the felony] Yet it seemeth also just and right, that the justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as maketh against the prisoner: for such information, evidence, or proof so taken, is only to inform the king and his justices of the truth of the matter. *Dalt. c. 165.*

Examination.

Shall certify at the next gaol delivery] And yet for petty larcenies, and small felonies, the offenders may be tried at the quarter-sessions, and the examinations and informations may be certified thither. *Dalt. c. 164.*

To be holden within the limits of their commission] And yet examinations taken by justices of the peace in one county, may be by them certified in another county, and there read, and given in evidence against the prisoner. *Dalt. c. 164.*

To bind by recognizance] And upon refusal may commit the person refusing. *1 H. H. 586.*

And the parties grieved ought to be bound, not only to give evidence, but also to prefer a bill of indictment against the prisoner. *Dalt. c. 164.*

A. Examination of a felon.

County of **T**HE examination of A. O. of — yeoman, taken before me — clerk, one of his majesty's justices of the peace for the said county [or, in the case of bail, — taken before us — two of his majesty's justices of the peace for the said county, and one of us of the quorum] the — day of — in the year of the reign of —

The said A. O. being charged before me [or, us] by A. I. of — yeoman, with the felonious stealing out of the house of the said A. I. at — on the — day of — the following goods, to wit, — to the value of — be the said A. O. upon his examination now taken before me [or, us] confesseth that — [or denieth that —] &c.

B. Information of a witness.

County of **T**HE information of A. I. of — yeoman, taken upon Dublin. **T** oath before me [as before.]

C. Recognizance to give evidence.

County of **B**E it remembred, that on the — day of — in the Dublin — year of the reign of — A. I. of — in the said county yeoman, did come before me —, clerk, one of the justices of our said lord the king, assigned to keep the peace in the said county, and did acknowledge himself to owe to our said lord the king ten pounds of lawful money of Great Britain, under condition, that if he shall personally appear before the justices of our said lord the king, at the next general quarter sessions of the peace [or, gaol delivery] to be holden in and for the said county, then and there to give evidence in behalf of our said lord the king, against A. O. late of — who being attached, and suspected of felony, is now committed to the gaol of our said lord the king in the said county, then this recognizance to be void, otherwise of force.

Or

Or thus, to prefer a bill of indictment, and give evidence.

County of **B**E it remembred, that on the — day of — in the —
Dublin. year of the reign of — A. I. of — in said
county, yeoman, personally came before me —, esq; one of the
justices of our said lord the king, assigned to keep the peace in the said coun-
ty, and acknowledged himself to owe to our said lord the king, the sum of
— of good and lawful money of Great Britain, to be made and levi-
ed of his goods and chattels, lands and tenements, to the use of our said lord
the king, his heirs and successors, if he the said A. I. shall fail in the con-
dition indorsed.

L. P.

The condition of the within written recognizance is such, that whereas one
A. O. late of — was this present day brought before the justice within
mentioned by the within bounden A. I. and was by him charged with the fe-
lonious taking and carrying away — of the goods of him the said A. I.
and thereupon was committed by the said justice to the common gaol in and
for the said county: if therefore he the said A. I. shall and do at the next
general quarter sessions of the peace [or, gaol delivery] to be holden in and
for the said county, prefer, or cause to be preferred, one bill of indictment of
the said felony against the said A. O. and shall then also give evidence
there concerning the same, as well to the jurors that shall then inquire of the
said felony, as also to them that shall pass upon the trial of the said A. O.
that then the said recognizance to be void, or else to stand in full force
for the king.

D. Warrant for a witness.

— { To the constable of —

WHEREAS oath hath been made before me — one of his Majesty's
justices of the peace in and for the said county, by A. J. of —
yeoman, that he the said A. I. was lately robbed at — and that he
hath good cause to believe that A. W. of — is a material witness to
prove by whom the said robbery was committed: These are therefore to require
you to cause the said A. I. forthwith to come before me, to give such infor-
mation and evidence as he knoweth concerning the said offence, that such fur-
ther proceeding may be had therein, as to the law doth appertain. Given un-
der my hand and seal at — in the said county, the — day of —.

Excise and Customs.

AS the custom and excise, so far as justices of the peace, constables and
other peace officers, are concerned therein, are in some measure con-
nected and interwoven with each other; it is thought proper here to repre-
sent them together, that the reader may at once have a full and distinct
comprehension of the whole.

1. By

Oath of Commissioners.

1. By the act, 14 & 15 C. 2. c. 8. The commissioners of the excise and all others employed under them, shall before they enter upon their respective employments take the oath of * supremacy, and the oath of allegiance, and likewise the following oath *mutatis mutandis* for their true and faithful performance of their respective trusts. *f.* 43.

You shall swear to be true and faithful in the place of commissioner, sub-commissioner, collector, &c. for the excise, during the time you shall be a commissioner, sub-commissioner, collector; you shall according to the best of your knowledge, power and skill, execute the same diligently, faithfully, and impartially. You shall make and deliver a true account of all your receipts from time to time, and further do all things without having any private respect to your self in prejudice of his Majesty's revenue.

So help you God, &c.

* This oath is abrogated and other oaths appointed by Eng. Stat. 3 W. & M. c. 2. See Tit. Oaths.

Offices of Excise.

2. The like offices and so many of them, and in them such sub-commissioners or collectors shall be appointed in all the counties of this realm, and in all other cities and places thereof, as the said commissioners or the major part of them shall think fitting, to be approved of by the lord lieutenant or chief governors and privy council of Ireland. *f.* 44.

Oath before a justice.

Which sub-commissioners or collectors shall take the like oath as aforesaid respectively before the lord chief baron of the exchequer, or before the said chief commissioners or any two of them, or before any justice of the peace. *f.* 45.

Officers sworn by a justice.

3. And by the 33 G. 2. c. 10. Every person appointed to any employment in his Majesty's revenue, may with the consent of the chief commissioners of excise, or any three of them, be sworn and take the oath of office, or other oaths, which they are required by law to take, before their entring on their offices, either before such persons as are now authorized to administer the same, or before any justice of the peace, or before the collector of the district where such officer shall be appointed to reside, in the several counties, counties of towns, and cities, where such officer shall be appointed to reside. *f.* 101.

Collector's oath.

4. And such collector, or justice of the peace, are required to administer the said oaths, and such persons, who shall be so sworn before such collector, or any justice of the peace in the several counties, counties of towns, or cities, may take upon them the execution of their offices.

5. Also, by the same statute, every collector of his Majesty's revenue shall, to every quarterly account by him sent up to the commissioners of his Majesty's customs or excise, annex the following oath in writing, to be by him signed and made before a justice of the peace, or chief magistrate of some city or town corporate. *f.* 109.

I A. B. Collector of do swear, that I have carefully perused and examined the foregoing account of receipts and payments for his Majesty's use, for the quarter ending the day last, containing pages, and have carefully compared the same with the several vouchers and entries, and that the same is, to the best of my knowledge, judgment, and belief,

lief, a just and true account, and contains all the receipts and payments that I, as collector, am accountable for within the period of time therein comprehended; and further, that the several arrears returned in the said account are really due and lying out uncollected, as I verily believe.

This act is continued, by st. 3. G. 3. c. 21. for two years, from the 24th of June, 1764, and to the end of the then next session of parliament.

6. And, by the said statute, 14 C. 2. c. 8. The commissioners, sub-commissioners, and collectors of excise are authorized to issue warrant of distress under the hands and seals of them or the major part of them, for levying of any forfeiture, fine, or penalty inflicted by this act, by distraining so much of the goods of the party against whom judgment shall be given, as may be sufficient to satisfy such forfeiture, fine, or penalty. *f. 51.*

Warrants of distress.

7. For want of distress to be had to satisfy any forfeiture, fine, or penalty imposed by this act, not exceeding ten pounds, it shall be lawful to the commissioners in the city and port of *Dublin*, and to the sub-commissioners and collectors in any other port of *Ireland*, together with a justice of peace, or other chief magistrate of any corporation-town, to commit the party offending to the next gaol or house of correction, there to be put to work if they be able, and to have such allowance as they shall deserve by their own labour during such times as they shall continue in the said gaol or house of correction, which shall not exceed the space of six weeks. *f. 52.*

Committal with a justice.

8. And all keepers of any prison, and all masters of any house of correction are required to receive and keep in safe custody and put to work all such persons, as by warrant of the commissioners of excise or their sub-commissioners or collectors, and the said justices of peace or chief magistrate as aforesaid, shall be committed unto their several gaols, prisons, or houses of correction, for which prisoners all sheriffs respectively shall be responsible. *f. 4.*

Escape by gaolers, &c.

9. And if any sheriffs, gaoler, or master of any house of correction shall refuse to receive and set on work such persons, or shall suffer any persons committed as aforesaid to escape out of their custody, or permit them to go forth out of prison or house of correction, without warrant in writing from them that committed such person, or that by this act are authorized to do the same, every such sheriff or other officer aforesaid shall forfeit double the value of every sum of money for which such person shall be committed to them as aforesaid, the same to be levied by distress and sale of the goods of such sheriff or deputies, gaoler or master of any house of correction, as before is directed.

Gaolers, &c. refusing.

10. No distress, taken by virtue of this act, of the goods and chattels of any vintner, inn-keeper, victualler, alehouse-keeper, or other brewing, making, and selling by retail, any beer, ale, *aquavita*, or strong waters, shall be disposed of until fourteen days after such goods shall be distrained; and within that time any such vintner, inn-keeper, victualler, alehouse-keeper, or other person as aforesaid, finding themselves grieved, may make their complaint unto one of the next justices of the peace, who, upon such complaint, is authorized to examine the same upon oath, and finally determine the matter of complaint, and to mitigate any fine or forfeiture inflicted by this act, so as by such mitigation, the same may not be made less than double the value of the duties of the excise which ought to have been paid, besides

Sale of distress.

Complaint to a justice.

besides the reasonable costs and charges of the officers distraining to be allowed by the justices, nor the party complaining receive encouragement to continue the practice of any fraud or disobedience in breach of any clause of this act. *f. 40.*

One of the next justices] Mr. Shaw, who seems to have taken some pains on this article, saith hereupon, that where the *next* justices are impowered to proceed in any matter, they and no other ought in such case to act; but where it is only directed, that the justices residing *near* shall do such a thing, those words are not restrictive, but only directory, and any justices, altho' not the *next* justices, may proceed therein. *Shaw. Exc.*

Justices, &c.
to assist officers.

11. All sheriffs, justices of the peace, mayors, port-reeves, sovereigns, constables, and all others his Majesty's officers in the several counties, baronies, liberties, franchises, and jurisdictions of this realm, are required to be at all times aiding and assisting unto the commissioners of excise, their sub-commissioners, collectors, and all other officers and persons employed by or under them, in the due execution of this act, and punishing all offenders according to law, and doing all other things by this act required to be done by them. *f. 60.*

Subornation of
witnesses.

12. If any person unlawfully or corruptly procure any witness by reward, promise, or any sinister and unlawful means whatsoever, to commit any wilful or corrupt perjury in any matter, cause, or thing, which by virtue of this present act shall depend or come before the said commissioners for appeals or of excise, their sub-commissioners, or collectors, by complaint or information, or if any person either by subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully or corruptly commit any manner of wilfull perjury by his or their depositions before the said respective commissioners, or their sub-commissioners, or collectors, or any of them, in any matter before-mentioned, every such offender or offenders, shall, for his or their said offence, being thereof lawfully indicted and convicted, lose and forfeit such sum of money, and further shall be proceeded against, set and put in the pillory, as in and by one statute made in this realm in the eight and twentieth year of the reign of the late Queen *Elizabeth*, is enacted. *f. 56.*

Perjury com-
mitted.

Justices, &c.
to inquire.

13. And the justices of assize and gaol delivery in the several circuits, and the justices of peace in every county within this realm, at their quarter-sessions, both within liberties and without, shall have full power and authority by virtue thereof, to inquire of all and every the defaults and offences last before-mentioned, by inquisition, presentment, bill, or information, before them exhibited, or otherwise, lawfully to hear and determine the same, and thereupon to give judgment, award process and execution of the same, according as in and by the said statute is directed.

Wearing
disguises.

14. By the act 33 G. 2. c. 10. Every person who shall be found passing, knowingly and wittingly, with any exciseable goods landed from any ship or vessel, without the due entry and payment of the duties chargeable thereon, in their custody, from any of the coasts of this kingdom, within ten miles of any of the said coasts, and shall be five or more in company, and shall wear any vizard, mask, or other disguise, when passing with such goods, shall, being legally convicted thereof by the verdict of a jury, or by their confession, be adjudged guilty of felony, and shall, for their offence, be transported

Transporta-
tion.

sported as a felon to some of his Majesty's plantations in *America*, there to remain for seven years. *f. 35.*

15. If any person who shall be guilty of any felony afore-mentioned, shall, within three months after such his offence, and before his conviction, discover two or more of his accomplices therein, to the commissioners or sub-commissioners of excise, or to any one of them, so as such accomplices, or two of them at least, be convicted of such offence, the offender so discovering, shall be acquitted of such offence. *f. 36.*

Pardon to discoverers.

16. If any persons shall unlawfully assault or beat any officer of his Majesty's revenue, or his assistants, in the due seizing and securing any exciseable goods, which they have reasonable cause to suspect to be liable to a seizure by the laws of the land, or by force or violence rescue or carry away, or shall procure to be rescued or carried away, any such goods, after legal seizure as aforesaid, or shall at or after such seizure, destroy or damage the said goods or any part of them, every person so offending, being thereof legally convicted, by the verdict of a jury of twelve men, or upon his or her confession, shall, for the first offence, forfeit one hundred pounds; and upon failure of payment thereof, shall suffer imprisonment for twelve months; and for the second offence, shall be transported to some of his Majesty's plantations in *America*, there to continue for seven years. *f. 37.*

Assaulting revenue officers.

Second offence made felony.

17. If any person shall counterfeit or forge any inland permit, let-pass, or coast-cocket, for the carriage of goods, in cases where by law permits, let-passes, or coast-cockets are required, or shall counterfeit or resemble any impression, stamp, or mark, appointed by the commissioners of his Majesty's excise, or any three or more of them, to be put to or upon such permit, let-pass, or coast-cocket, or shall make use of any such counterfeit or forged permit, or coast-cocket, with such counterfeit impression, stamp, or mark, knowing the same to be counterfeit, such persons being thereof legally convicted, by the verdict of a jury of twelve men, or upon their confession, shall be adjudged guilty of felony, and shall be transported to some of his Majesty's plantations in *America*, there to continue seven years. *f. 51.*

Forging inland permits.

Transportation.

18. If any person who shall be adjudged to be transported pursuant to this act, shall, at any time within seven years after such transportation, be found at large in this kingdom without some lawful cause, or not being licenced thereto by his Majesty, under his privy seal, or by the chief governors of this kingdom, such person shall suffer death as a felon without the benefit of clergy, and shall be tried in any county of this kingdom, where he shall be apprehended. *f. 52.*

Returning from transportation.

19. In case any person shall refuse to permit, or shall not suffer any surveyor, searcher, waiter, or officer of his Majesty's revenue, who shall from time to time be duly deputed and appointed thereto, to enter or come into, or remain in their house, cellar, vault, shop, ware-house, store-house, or store-cellar, or other places to search for such exciseable goods, as he may reasonably suspect to be concealed in such place, it shall be lawful for such officers, after such refusal, to break open and enter in the day time, in the presence of a constable, into any house, cellar, vault, shop, ware-house, store-cellar, or other place or places belonging to any such persons as aforesaid, and to search for any goods for which the duties payable thereupon to his Majesty have not been paid. *f. 32.*

Breaking doors.

In presence of a constable.

1. **W**HERE a person attainted hath been at large after his attainder, and afterwards is brought into court and demanded why execution should not be awarded against him; if he deny that he is the same person, it shall be immediately tried by a jury returned for that purpose.

2 *Haw.* 463.

2. The court may command execution to be done, without any writ.

2 *Haw.* 463.

3. In fixed and stated judgments, the law makes no distinction between a peer and a commoner, or between a common and ordinary case, and one attended with extraordinary circumstances; for which reason it was adjudged in *Felton's* case, who murdered the duke of *Buckingham*, that the court could not order his hand to be cut off, nor make it part of the sentence that his body should be hanged in chains, but that the body after execution being at the king's disposal, might be hanged in chains, or otherwise ordered as the king should think fit. 2 *Haw.* 443.

4. But the king may pardon part of the judgment; as where the judgment is hanging, beheading, imbowelling, and the like, the king may pardon all but the beheading; whereby the judgment is not altered, but part of it remitted. 2 *H. H.* 412.

5. It is clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again; for the judgment was not executed till he was dead. 2 *Haw.* 463.

Extortion.

IT is said, that extortion, in a large sense, signifies any oppression under colour of right; but that, in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. 1 *Haw.* 170.

And by the statute of the 3 *Ed.* 1. c. 26. (which is only in affirmation of the common law) *No sberiff, nor other the king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth, shall yield twice as much, and shall be punished at the king's pleasure.*

No sberiff nor other the king's officer] Under these words, the law beginning with the *sberiffs*, are understood escheators, coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of this act, which do any way concern the administration or execution of justice, or the common good of the subject, or for the king's service. 2 *Inst.* 209.

Also the justices of the peace, whose office was instituted after this act, are bound by their oath of office, to take nothing for their office of justice of

of the peace to be done, but of the king, and fees accustomed, and costs limited by statute.

And generally, no publick officer shall take any other fees or rewards, for doing any thing relating to his office, than some statute in force gives him, or else as hath been antiently and accustomably taken: and if he do otherwise, he is guilty of extortion. *Dalt. c. 41.*

Shall take any reward] Therefore by this statute, they can at this day take no more for doing their office, than hath been since allowed to them by authority of parliament. *2 Inst. 210.*

And all prescriptions which have been contrary to this statute, and to the common law in affirmance of which it is made, have been always holden to be void. *1 Haw. 170.*

And it has been resolved, that a promise to pay them money for the doing of a thing, which the law will not suffer them to take any thing for, is merely void. *1 Haw. 171.*

To do his office] It is not said, that he shall take no reward generally, but no reward to do his office: Thus the fee of 20*d.* called bar fee, time out of mind taken by the sheriff of every prisoner that is acquitted, is not against this statute; for it is not taken for doing his office. *2 Inst. 210.*

But there seems to be no necessity for this distinction, for it cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers; for the chief danger of oppression is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts, which will not suffer them to be exceeded, without a proper resentment. *1 Haw. 171.*

But in the ecclesiastical court, a person was libelled against for fees, and upon motion a prohibition was granted, for that it was holden that no court hath a power to establish fees: the judge of a court may think them reasonable, but that is not binding; but if on a *quantum meruit* a jury think them reasonable, then they become established fees. *1 Salk. 333.*

The fees in sessions, for traversing, trying, or discharging indictments, discharging recognizances, and the like, do vary according to the different customs in different places. *Dalt. c. 41.*

Shall yeild twice as much] At the common law this offence is severely punishable, at the king's suit, by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed. And this statute doth add a greater penalty than the common law did give; for hereby the plaintiff shall recover his double damages. *2 Inst. 210. 1 Haw. 171.*

And by the *31 El. c. 5.* Actions for extortion may be laid in any county.

At the king's pleasure] That is, by the king's justices, before whom the cause depends. *2 Inst. 210.*

Extortion.

Indictment for extortion in a gaoler.

THE jurors for the lord the king, upon their oath present, that A. O. late of— in the said county, yeoman, on the— day of— in the year of the reign of— was taken upon suspicion of having committed a certain felony, by— constable of— in the said county, by virtue of a warrant directed to the said— under the hand and seal of R. B. doctor of laws, then and yet one of the justices of our sovereign lord the king, assigned to keep the peace in the said county, and was on the same day and year committed by him the said R. B. to A. G. keeper of the gaol of our said sovereign lord the king at— in the said county, under the custody of him the said A. G. to be safely kept, upon suspicion of the felony aforesaid, and the said A. O. was detained in that prison under the custody of the said A. G. from the time that he was committed to the said prison for one month from thence next ensuing, upon suspicion of the said felony; nevertheless the said A. G. in no wise regarding the statute in that case made, and the penalty therein contained, did on the— day of— at— aforesaid in the said county, demand and receive— pounds of lawful money of Great Britain of and from the said A. O. for ease and favour in the said gaol for the said time, in contempt of our said sovereign lord the king, and against the form of the statute aforesaid, and against the peace of our said sovereign lord the king, his crown and dignity.

Indictment for extortion of a bailiff.

THE jurors for our lord the king upon their oath present, that A. B. late of— in the said county, yeoman, being bailiff of the hundred of— in the said county, on the— day of— in the— year of the reign of— at— in the said county, by pretext and colour of his said office, did unjustly and by extortion take and extort 5 s. of one A. I. of— in the said county, yeoman, one of the freeholders qualified to serve upon juries in the said county, to excuse the said A. I. from attending or appearing at the assizes that were then next to be holden in and for the said county, when in fact the said A. I. was not returned by the sheriff of the said county in any panel of jurors, and also when indeed no such sum of money was due to the said A. B. for his fee for excusing the attendance or appearance of the said A. I. at the assizes aforesaid, to the evil example of other offenders, to the great damage of him the said A. I. and against the peace of our said lord the king, his crown and dignity.

Felony, Disposition of Felony, and Theftbote.

I. Felony.

FELONY is generally supposed to come from the Saxon *fell*, which signifieth fierce, or cruel; of which the verb *fell* signifieth to throw down or demolish; and the substantive of that name is used to signify a mountain rough and uncultivated. But the same word, with a little variation

tion, runneth through most of the *European* languages, and signifieth more generally an offence at large; and the *Saxon* word *fællan* signifieth to offend, and *fællnisse* an offence or *failure*: and although *felony*, as it is now become a technical term, signifieth in a more restrained sense an offence of an high nature, yet it is not limited to *capital* offences only, but still retaineth somewhat of this larger acceptation; for petit larceny is felony, although it is not capital.

It would swell this title near to the bigness of half the book, to set down every thing which may be comprehended under this word *felony*: therefore it is necessary to refer the consideration of the several particular kinds of felonies to their respective titles; as for instance, *Homicide*, *Robbery*, *Burglary*, *Rape*, *Coin*, *Forgery*, and many others; and especially the law relating to stolen goods of all kinds belonging to title *Larceny*.

The method of bringing a felon to justice from the first commission of the felony, to his condemnation and execution, is treated of under the several titles of *Hue and cry*, *Arrest*, *Examination*, *Bail*, *Commitment*, *Gaol*, *Arraignment*, *Appeal*, *Indictment*, *Mute*, *Confession*, *Jurors*, *Evidences*, *Clergy*, *Judgment*, *Attainder*, *Forfeiture*, *Transportation*, *Execution*. And the course and whole procedure of trying an offender, is treated of under title *Sessions*.

II. Misprision of felony.

Misprision of felony (from the *French* word *mespris*, a neglect or contempt, 3 *Inst.* 36.) is the concealing of a felony which a man knows, but never consented to: for if he consented, he is either a principal or accessory in the felony, and consequently guilty of misprision of felony and more.

1 *H. H.* 374.

For it is said, that every felony includes misprision of felony, and may be proceeded against as a misprision only, if the king pleases. 1 *Haw.*

125.

The punishment of misprision of felony in a common person, is fine and imprisonment; in an officer, as sheriff or bailiff of liberties, imprisonment for a year, and ransom at the king's pleasure, by the statute of 3 *Ed.*

1. c. 9.

If any person will save himself from the crime of misprision, he must discover the offence to a magistrate with all speed that he can. 3 *Inst.*

140.

Misprision, in a larger sense, is used to signify every considerable misdemeanor, which hath not a certain name given to it in the law.

III. Theftbote.

Theftbote (from the *Saxon* words *theft* and *bote*, boot or amends) is, where one not only knows of a felony, but takes his goods again, or other amends not to prosecute. 1 *Haw.* 125.

But the bare taking of one's own goods again, which have been stolen, is no offence, unless some favour be shewn to the thief. 1 *Haw.* 125.

This

Felony, &c.

This offence is very nearly allied to felony, and is said to have been anciently punished as such; but at this day it is punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. *1 Haw. 125.*

Warrant for felony.

County of *Dublin.* { To the constable of_____

FORASMUCH as A. I. of_____in the county of_____yeoman, hath this day made information and complaint upon oath, before me_____one of his Majesty's justices of the peace for the said county, that this present day divers goods of him the said A. I. to wit,_____have feloniously been stolen, taken, and carried away from the house of him the said A. I. at_____aforesaid in the county aforesaid, and that he hath just cause to suspect, and doth suspect, that A. O. late of_____yeoman, feloniously did steal, take, and carry away the same [Or otherwise as the case shall be:] These are therefore to command you forthwith to apprehend him the said A. O. and to bring him before me to answer unto the said information and complaint, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal the_____day of_____in the year_____.

The forms of indictments for stolen goods of various kinds, are inserted under the title **Larceny.**

Fire.

Magistrates,
&c. to attend
at fires.

Persons pilfer-
ing, to be seiz-
ed.

Fire-cocks to
be placed on
the mains and
pipes.

1. **B**Y the 2 G. 1. c. 5. Upon the breaking out of any fire within the city of *Dublin*, or any other city or town corporate in this kingdom, the chief magistrate, constables and beadles of such city or town corporate, upon notice thereof, shall immediately repair to the place where the said fire shall happen, with the badges of their authority, and be aiding and assisting, as well in the extinguishing the said fires, and causing people to work at the engines for throwing up water for the extinguishing fires in such cities or towns corporate where such engines are or shall be provided; as also, in preventing goods being stolen, and shall seize and apprehend all ill-disposed persons that they shall find stealing and pilfering from the inhabitants.

2. Also the said chief magistrates, constables, and beadles, shall give their utmost assistance to help the inhabitants to remove their goods.

3. By 6 G. 1. c. 15. The church wardens of every parish within the city of *Dublin*, and liberties thereof, and liberties adjoining, may make, place, or fix, at the charge of such respective parish, upon the mains and pipes, belonging to any water-work whatsoever, within the place aforesaid, where such mains and pipes are laid within the said city and liberties, such and so many stop-blocks of wood, with a two-inch plug, or such and so many fire-cocks to go into each main and pipe, and to be placed at such distances

distances in any street and place where such church-wardens shall direct or appoint, and the top of such stop-blocks to lye even with the pavement of each street or place, to the intent such plugs or fire-cocks may always upon occasion of any fire be opened, and let out the water without any loss of time in digging down to the pipes.

4. And the church wardens shall fix any mark or writing in the front of any house over against the said place, for the better making known where such stop-blocks and fire-cocks do lye, and keep an instrument in each house where the mark is fixed to open the plug or fire-cock.

5. Such stop-blocks, plugs, and fire-cocks, to be repaired at the charge of each parish where they shall be so placed; and every parish within the city and suburbs of *Dublin*, and liberties adjoining, shall at all times have and keep in good order and repair, in some known and publick place within each parish, a large engine, and also an hand-engine to throw up water for the extinguishing of fires.

Fire-cocks to be repaired at the charge of the parish. Every parish to have a large engine, &c.

6. And also shall provide, keep, and maintain, one leather pipe and socket of the the same size as the plug or fire-cock, that the socket may be put into the pipe, to convey the water clean and without loss of time or help of bucket into the engine.

7. And in default of making, placing, fixing, and continuing such stop-blocks or fire-cocks, on the several mains and pipes; as also in default of having and keeping in good repair such large engine, hand-engine, leather pipe and socket as aforesaid; the respective grand-juries of the respective counties where such parish lies, shall, at the quarter-sessions for such county, present and charge upon the several inhabitants of such parish, such sum of money as may enable the church-wardens to buy and provide such stop-blocks with a two-inch plug and fire-cocks, as shall be necessary to be fixed in such parish.

Presentment in case of default.

8. And also to buy and provide within such parish a large engine, and a hand-engine, to throw up water, with one leather pipe and socket of the same size as the plug or fire-cock, the same to be levied on the said parish, as other publick monies are levied within the said county.

9. The minister, church-wardens, and parishioners, of the several parishes within the said city and suburbs, and liberties adjoining, in their respective vestries every year, on the first day of *January*, or within two days after, shall appoint one or more person or persons in each parish to take care of the said engines, leather pipe and socket, and of the several stop-blocks and fire-cocks, on the mains and pipes within the said parish, who from time to time, as there shall be occasion, shall, at the charge of the said parish, keep and maintain them in good order and repair.

Persons to be appointed to take care of them.

10. If the person or persons so appointed, shall neglect or omit to keep them in good order and repair, being convicted thereof before two justices, by the oath of one or more witnesses, they shall forfeit ten pounds, one moiety to the informer, the other to the church-wardens of the said parish, to be laid out in providing, maintaining, and repairing, such engine or engines, leather pipe and socket, to be recovered by warrant from two justices, by distress and sale of such offender's goods, the overplus, if any be, to be returned to the owner.

Penalty on such persons for neglect, &c.

Fire.

11 The first engine-keeper, who in the city of *Dublin*, and liberties adjoining, brings a parish-engine to help to extinguish any fire, if in good order and compleat, with a socket hole and leather pipe, shall be paid twenty shillings; the keeper of the second parish-engine that shall be brought to a fire, shall be paid ten shillings, and the third five shillings by the churchwardens of each parish where such fire shall happen.

12 The money to be afterwards charged and paid by the inhabitants of such parish, to reimburse the churchwardens, as other parish cesses are raised.

13 And in default of Payment, such reward shall be recovered from the churchwardens where such fire shall happen, by warrant from two justices of the peace, by distress and sale of such churchwardens goods, the overplus, if any, to be returned to the said churchwardens.

A warrant to levy ten pounds on an engine-keeper for not keeping the engine in repair.

To the Constable of the parish of _____

County of the City of *Dublin*, to wit. } **W**HEREAS A. B. appointed by the minister, churchwardens, and parishioners of the parish of C. in the county aforesaid, to take care of the engines, leather-pipe and socket, and of the stop-blocks and fire-cocks in the said parish, hath this present day been duly convicted before us C. D. and E. F. esquires, two of his Majesty's justices of the peace for the said county, by the oath of G. H. and I. K. of neglecting to take care of, and keep in repair, the engines leather-pipe and socket, stop-blocks and fire-cocks of the said parish, whereby he hath forfeited the sum of ten pounds: These are therefore, in his Majesty's name, to require and command you, forthwith to levy the said sum of ten pounds on the goods of the said A. B. by distress and sale thereof, rendering him the overplus; and that you pay one moiety thereof to L. M. of the parish aforesaid, who informed us of the said offence, and the other moiety to the churchwardens of the said parish, to be laid out in repairing such engines, leather-pipe and socket, stop-blocks and fire-cocks: Hereof fail not. Given under our hands and seals. _____

A warrant to levy the reward for an engine-keeper bringing an engine to a fire.

To the constable of the parish of _____

County of the City of *Dublin*, to wit. } **W**HEREAS Proof hath been this day made before us C. D. and E. F. esquires, two of his Majesty's justices of the Peace for the county aforesaid, that A. B. engine-keeper of the parish of C. in the said county, was the first engine-keeper who brought a parish engine to the fire which lately happened in the parish of B. whereby

whereby he is intitled to be paid the sum of twenty shillings by the churchwardens of the said parish of B. and that the said A. B. did demand the said sum of twenty shillings from G. H. and I. K. the churchwardens of the said parish, and that they refused to pay the same: These are therefore, in his Majesty's name, to require and command you, forthwith to levy the said sum of twenty shillings, on the goods of the said G. H. and I. K. or either of them, by distress and sale thereof, rendering the overplus; and that you pay the same to the said A. B. Hereof fail not. Given under our hands and seals (and so forth.)

Fireworks.

1. **B**Y the 5 Geo. 2. cap. 12. It shall not be lawful for any persons to make or cause to be made, or sell or expose to sale any squibs, rockets, serpents, or other fire-works, or any cases, moulds, or other implements for the making any such squibs, or for any persons to permit any squibs or other fire-works to be thrown or fired from or in their houses, lodgings, or habitations, or place thereto belonging, or adjoining into any public street, road, or passage, or for any persons to throw or fire, or to be assisting in the throwing or firing of any squibs or other fire-works, into any public street, house, shop, river, highway, road or passage, and every such offence shall be adjudged to be a common nuisance.

Making or firing squibs.
A common nuisance.
Penalty of five pounds.

2. If any persons shall make or cause to be made, or shall give, sell, or utter any squibs, or any moulds or implements for the making any such squibs, every such person so offending, and being thereof convicted before one justice of the peace, or chief magistrate of the place where such offence shall be committed, by the confession of the parties, or the oaths of two witnesses, shall forfeit five pounds.

3. And if any persons shall permit any squibs to be thrown or fired from their houses, shops, lodgings, or habitation, or in any place thereto belonging or adjoining into any public street, road, or passage, or any other place, every such person so offending, and being thereof, as aforesaid, convicted, shall forfeit twenty shillings.

Permitting squibs to be fired.

4. The said several forfeitures to be levied by distress and sale of the goods of every such offender, by warrant of the justice or chief magistrate, before whom the convictions shall be made, the one half of the forfeitures to be to the use of the poor of the parish where such offence shall be committed, and the other half to the use of them who shall prosecute and cause such offenders to be convicted. *f. 2. § 3.*

5. If any persons shall throw or fire, or be aiding or assisting in the throwing or firing of any squibs into any public street, house, shop, river, highway, or passage, every person so offending, and being thereof, as aforesaid, convicted, shall forfeit twenty shillings, to the uses aforesaid. *f. 3.*

Throwing squibs.

6. And if the persons so offending shall not immediately, upon their being convicted, pay to the justice or chief magistrate, before whom such conviction shall be made, the said forfeitures for the uses aforesaid, such justice or chief magistrate are required by warrant to commit such persons to the house of correction within the county or liberty where such offence shall be committed, there to be kept at hard labour for any time not exceeding one month,

Committal for want of distress.

month, unless such offender shall sooner pay such forfeitures to the said justice.

Proviso.

7. Provided that it shall be lawful for the master, lieutenant, or commissioners of his Majesty's ordnance, or any other persons to be by any of them authorized to give orders for the making any sorts of fire-works, to be used and fired according to such orders. *s. 4.*

General issue.

8. Any person sued for putting in execution this act, may plead the issue of not guilty, &c. and if the plaintiff be nonsuited, or a verdict pass for the defendant, or if such plaintiff discontinue his action, or if upon demurrer judgment be given for the defendant, such defendant shall have his full treble costs. *s. 5.*

Summons for selling squibs.

County of Dublin, }
to wit, } Mr. —

THESE are in his Majesty's name to command you to appear before me, one of his Majesty's justices of the peace for the said county, on — the — day of — at — of the clock in the — noon, to shew cause why the penalty of five pounds should not be levied on your goods and chattels for having sold, as I am informed, squibs, rockets, &c. contrary to the statute in that case made: And hereof fail not. Given under my hand and seal this — day of —

A warrant to levy the forfeiture for selling squibs or other fire-works.

To the constable of —

County of }
—to wit. } **W**HEREAS A. B. and C. D. of E. in the county aforesaid, this day made oath before me F. G. Esq; one of his Majesty's justices of the peace for the said county, that I. K. of L. in the said county, did, on the second day of this instant August, at L. aforesaid, sell [or, make, or, expose to sale, as the case is] one dozen of squibs, [rockets, serpents, or other fire-works, as the case is] contrary to the statute in that case made and provided, whereby he hath forfeited the sum of five pounds: These are therefore, in his Majesty's name, to command you, forthwith to levy the said sum of five pounds on the goods of the said I. K. by distress and sale thereof, rendering the overplus; and that you pay one moiety thereof to the church-wardens of the parish of L. aforesaid, for the use of the poor of the said parish, and the other moiety to R. S. of L. aforesaid, who prosecuted the said I. K. to conviction, for the said offence. Hereof fail not. Given —

The like warrant, *mutatis mutandis*, to levy the forfeiture of twenty shillings for throwing squibs.

Warrant

Warrant to apprehend a person for casting squibs into the publick street.

To the constable of——

WHEREAS complaint and information upon oath hath been made unto me, one of his Majesty's justices of the peace for the said county, that of——in the said county, did on the——day of——cast squibs, rockets, &c. into the publick street at——in the said county, contrary to the statute in that case made; whereby the said——hath forfeited the sum of twenty shillings: These are therefore in his Majesty's name to command you to apprehend the said——and to bring him before me to answer to the said complaint, and to be further dealt withal according to law. Given under my hand and seal this——day of——

Commitment to the house of correction for non-payment of the penalty mentioned in the preceding warrant.

To the keeper of the house of correction at——

I Herewith send you the body of——who was this day convicted upon oath before me, one of his Majesty's justices of the peace for the said county, for casting squibs, &c. into the publick street at——whereby the said——hath forfeited the sum of——which he refused immediately to pay unto me, according to the direction of the statute in that case made: I therefore command you to receive the said——into your custody, and him safely keep to hard labour for the space of one month, unless he shall sooner pay the said forfeiture: And for so doing this shall be your sufficient warrant. Given under my hand and seal the——day of——in the year of our Lord——

Fish and Fishing.

- I. Of preserving the breed of fish.
- II. Fishing with unlawful engines.
- III. Fishing at unlawful times.
- IV. Of packing fish.

I. Of preserving the breed of fish.

1. **B**Y the 10 C. 1. ff. 3. c. 14. No persons with any net wheel or other device or engine, shall take any fry, &c. of eels in any water salt or fresh; and no persons shall willingly take or destroy by any wheel-net, net of hair or other engine, angling only excepted, flood-gate, salmon-pipe or at the tail of any mill or wier, or in any rivers or brooks salt or fresh, the young fry of salmon called lakespinks, smowtes or salmon peals.

Taking eel or salmon fry.

f. 1.

L 1 2

2. And

Penalty for
offences.

2. And no persons shall use or set or take any salmon with any stop-nets, still-nets, or standing-nets; and if any persons offend in any of the points before rehearsed, such persons shall forfeit for every such offence forty shillings and the fish, and also the unlawful nets and other unlawful engines made, kept, or used for taking or destroying of the young fry of eels or salmon, or setting out of the said stop-nets or taking the salmon therewith, the one half of the said forfeiture shall be to the King and the other half to him that will sue for the same in any court of record.

3. And the justices of assizes and the justices of the peace in every assize and quarter-sessions, shall have authority not only to enquire of offences committed contrary to this act, but also to hear and determine the same, and to inflict due punishment by fine, imprisonment, or otherwise according to this act.

Killing salmon-
fry.

4. And by the 12 G. 1. c. 7. If any person during the months of *February, March, April, or May* in any year, shall in any one day take or kill to the number of twelve salmon-fry, whether it be by angling or any other way whatsoever, and such person shall be thereof convicted upon their appearance or default after summons, by the oath of one credible witness before any justice of the peace of the county, city, or town corporate where such offence shall be committed, every such person shall forfeit ten shillings.

Warrant of
distress.

5. And it shall be lawful for such justices by warrant to levy the said ten shillings by distress and sale of the offenders goods, one half thereof to be for the use of the informer, and the other to the poor of the parish where the said offence shall be committed. *s. 3.*

Committal.

6. And for want of sufficient distress, it shall be lawful for such justice by warrant to commit such offender to the common gaol of the county, city, or place where such offence shall have been committed, for any time not exceeding ten days, unless such offender shall sooner pay the penalty so forfeited, and upon such payment to be discharged. *s. 3.*

II. Fishing with unlawful engines.

Keeping spears,
or using lights.

1. By the 2 G. 1. c. 21. No person shall make, have, or keep any lister or spear for killing of salmon, or make use of any light upon any fresh water river above the flowing of the tide, or shall make use of any nets or other engines for taking salmon-fry at any mill-tail; and persons offending herein, shall, for every such offence, forfeit twenty shillings, to be levied and disposed of in manner hereafter directed; as also such nets employed or made use of contrary to this act. *s. 1.*

Seizure of en-
gines, &c.

2. And it shall be lawful for any person, without other warrant than this act, to seize any lister or spear proper for killing salmon, or wheel-basket, or engine proper to take salmon-fry, although the same hath not been made use of to that purpose, and to carry the same before some justice of the peace of the county where the same shall be seized, who are required to destroy the same.

Apprehending
offenders.

3. It may be lawful for any person, without other warrant than this act, to seize and bring before one justice of the peace, every person whom he shall find offending contrary to this act, who is impowered upon conviction, by

by the testimony of one witness, of any person offending in any of the aforementioned particulars, to issue their warrants for the raising the several aforementioned penalties upon the goods of the offenders, which penalties, when levied, are to be paid to the informer. *f. 2.*

4. And in case the persons so offending shall refuse or not be able to pay the fine by this act imposed, the said justices shall by warrant under their hands and seals, commit such person to the house of correction or work-house for any time not exceeding one month, there to remain at hard labour and have due correction, or to be publicly whipt in the next market town, the next market day. Committal.

5. And by the 12 G. 1. c. 7. It shall be lawful for any persons without other warrant than this act, to seize and bring before one justice of the peace of the county where the offences shall be committed, such persons as they shall find fishing with their faces blacked or disguised, and also such persons as shall be found in or near any rivers, with their faces blacked or otherwise disguised, tho' such persons be not actually fishing at the time of such seizure. *f. 1.* Faces blacked or disguised.

6. Which justice, upon conviction of such offenders by the oath of one credible witness, shall, by *his* warrant, levy by distress and sale of the goods of such offenders, forty shillings, one moiety whereof shall be given to the informers, and the other moiety to the poor of the parish, where such offence shall be committed. Penalty of 40s.

7. And in case no sufficient distresses can be had whereout to levy the said forty shillings, the said justices shall, by warrant, commit such persons to the house of correction or work-house, for any time not exceeding thirty-one days, there to remain at hard labour, and to have due correction. Committal.

8. Also, by the 7 G. 2. c. 11. No drag-net or other sea-net which hath a mesh of less than three inches and a half from knot to knot, shall be made use of in catching any kind of fish, except herrings, pilchards, sprats, shrimps, and prawns, upon any part of the coast of this kingdom, or within any of the bays, rivers, or creeks thereof, nor shall any false or double bottom, cod, or pouch, or any other net, though of legal size, be placed upon or behind the other in order to take and destroy small fish. *f. 1.* Size of the meshes of nets.

9. And persons so offending, and being thereof convicted upon their appearance or default after summons, before one justice of the peace of the county or place where such persons offending have their usual place of abode, by the oath of one credible witness, or by confession of the party offending, shall, for every such offence, forfeit forty shillings, to be levied by warrant of such justice, before whom such offender shall be convicted, by distress and sale of the goods of such offender; the one moiety thereof to the person who shall inform, and the other moiety to be disposed of to the use of the poor of the parish where such offender lives. Penalty of 40s.

10. And in case no sufficient distress can be had whereout to levy the said forty shillings, the said justices shall by warrant under their hands and seals, commit such persons to the common gaol of the county or place where such offender shall be convicted, there to remain for any time not exceeding thirty days, unless such offender shall sooner pay the penalty so forfeited, upon payment whereof he is to be discharged. Committal.

Fish and Fishing.

III. Fishing at unlawful times.

Season for taking salmon.

1. By the 8 G. 1. c. 7. No person shall between the first day of *August*, and the first day of *February* in any year, take any salmon with nets or other engines; and if any persons shall offend herein, and be thereof convicted, by the oath of one credible witness, before any justice of the peace of the county where such offence shall be committed, such persons shall forfeit such nets and other engines, and also such boats, with the tackle thereto belonging, as they shall make use of in the taking any salmon, contrary to this act. *s. 21.*

Penalty of 20s.

2. And shall likewise forfeit twenty shillings for every such offence to be levied by distress and sale of the offenders goods, by warrant of the said justice, which several forfeitures shall be disposed of, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed.

Committal.

3. And in case a sufficient distress cannot be had whereout to levy the said twenty shillings, the said justice shall by warrant commit such persons to the house of correction or work-house, for any time not exceeding three calendar months, there to remain at hard labour, and to have due correction.

4. Provided, that nothing herein contained shall extend to prohibit the taking of salmon in rivers where such fish shall be known to be in season at the time of taking.

This statute is continued until the 29th of September, 1769, and to the end of the then next session of parliament by Stat. 21 Geo. 2. cap. 7. so far as it is not altered by the several act therein mentioned, which alterations do not relate to this head.

Season for drudging for oysters.

5. And by 7 G. 2. c. 11. No persons shall drudge for oysters within this kingdom, or in any part of the sea adjoining to the same, between the first day of *May*, and the twentieth day of *August* in any year; and if any persons shall offend herein, and be thereof convicted upon their appearance or default after summons, by the oath of one credible witness, before any justice of the peace of the county or place where such offender hath his usual place of abode, such persons, shall, for every such offence, forfeit forty shillings. *s. 2.*

Instruments for killing salmon.

6. And by the 31 G. 2. c. 13. No person shall, at any time between the twelfth day of *August*, and first day of *February*, in any year, fish in any river with any net, fishing-rod, or other instrument, or carry on the bank of any river, any gaff, loop, net, lister, or spear, or any other instrument for killing of salmon. *s. 1.*

Penalty of 5 l.

7. And if any person shall offend herein, every such offender, being thereof convicted by confession, or by the testimony of one sufficient witness upon oath, before some justice of the peace for the county where such offence shall be committed (which oath, such justice of the peace is required to administer) shall, for every such offence, forfeit five pounds, to be levied by the warrant of such justice, by distress and sale of the offenders goods.

8. And

8. And if no sufficient distress can be found, the offender shall, by the Committal. like warrant, be committed to the county gaol, there to remain without bail or mainprize, for such time, not exceeding three months, nor less than one month, as such justice shall appoint, unless the said forfeiture shall in the mean time be paid, in which case the offenders shall be enlarged.

9. And it shall be lawful for any person to apprehend and carry every such offender before the next justice of the peace for the county where such offence shall be committed, together with such of the said instruments as shall be found in his hands, without any warrant, other than the authority hereby given. Any person may seize offenders.

10. Every proprietor or farmer of any salmon fishery, or other person, who shall, at any time between the twelfth of *August* and first of *January* in any year, kill, or take, or be aiding or abetting, or accessory to the killing or taking of salmon in any river, being thereof convicted by confession, or by the testimony of two sufficient witnesses upon oath, before any justice of the peace for the county where such offence shall be committed, (which oath such justice is required to administer) shall, for every salmon so killed or taken, forfeit forty shillings, to be levied by the warrant of such justice, by distress and sale of the offenders goods, so as such forfeiture, upon any one conviction, do not exceed twenty pounds. *s. 2.* Proprietor of fisheries.

11. Or if any person shall, in the night-time, from the twelfth day of *August* to the first day of *February*, in any year, make use of any lighted torch, or any light, in any river, banks of a ford, or water course leading to a river, with intention to kill or take salmon, being thereof convicted, as aforesaid, such persons, shall for every such offence, forfeit five pounds, to be sued for and recovered in manner herein before directed, to be paid to the persons discovering the same. Fishing with lights.

12. And the making use of any such lighted torch, or any other light, in manner aforesaid, is declared to be evidence of such intention against the persons on whom the same shall be found, unless the contrary shall appear:

13. And if no sufficient distress shall be found, the offender shall, by Committal. warrant under the hand and seal of the justice before whom such offender shall be convicted, be committed to the county gaol, there to remain, without bail or mainprize, for any time not exceeding six months, and not less than three months.

14. Provided that nothing herein contained, shall extend to the rivers *Rathmalton*, *Lackagh Donnegall*, *Bundrouse*, all in the county of *Donnegall*; the river of *Sligoe*; the river *Sbannon*, from the sea to the island of *Saint Thomas*, above the salmon-wyer, belonging to the city of *Limerick*; the river *Boyne*, *Lough-Lean*, the rivers of *Lanne*, and *Caragh*, in the county of *Kerry*; the river *Lee*, which runs to the city of *Cork*; and the river *Busk*, in the county of *Antrim*; the river *Newport*, in the county of *Mayo*; and also the river *Feal*, in the county of *Kerry*. *s. 3.* Exceptions.

15. But it shall be lawful for any persons, qualified or impowered to fish for salmon in the said river *Feal*, to kill and take salmon in the said river, from the first day of *February* to the twentieth day of *October*, in every year; and if any person shall kill, or take, or be aiding, abetting, or accessory to the killing or taking of salmon in the said river, between the twentieth day of *October* and the first day of *February*, he shall be liable to the same penalties as if he had done so in the said river *Feal*. River Feal.

Fish and Fishing.

of *October* and the first day of *February*, in any year, such persons shall for every such offence, be liable to the several and respective penalties herein before mentioned, to be sued for, and recovered in manner herein before directed.

Setting nets by which salmon fry may be taken.

16 Every person who shall at any time, between the first day of *March*, and first day of *June*, in any year, set any nets, cohill-net, cleave, or any other instrument or engine, with a pretence to take eels, whereby salmon fry may be taken and destroyed, or fish, or be aiding or abetting, or accessory to the fishing with any set or fixed net, or cohill net, in any river or in any lake, or water-course, leading from any river, being thereof convicted by confession, or by the testimony of one sufficient witness upon oath, before any justice of the peace for the county where such offence shall be committed, (which oath such justice is required to administer) shall, for every such offence, forfeit ten pounds *sterling*, to be levied by the warrant of such justice, by distress and sale of the offenders goods. *s. 4.*

Committal.

17 And if no sufficient distress can be found, the offender shall, by the like warrant, be committed to the county gaol, there to remain without bail or mainprize, for such time, not exceeding six months, nor less than three months, as such justice shall appoint, unless such forfeiture shall in the mean time be paid, in which case the offender shall be enlarged.

Place of trial.

18 When any of the offences, mentioned in this act, shall be committed, in, or upon any river mearing between two counties, such offence may be prosecuted in either of such counties. *s. 5.*

Forfeiture to the informer.

19. The several forfeitures before mentioned, shall go to the first informer, who shall prosecute the respective offenders to conviction. *s. 6.*

Prosecution in three months.

20. Provided that every prosecution grounded on this act, shall be commenced within three calendar months next after the offence committed. *s. 7.*

21 Nothing herein contained, shall repeal any of the laws now in being, relating to the taking of salmon or salmon fry, but the same shall continue in full force as if this act had not been made, so as that no person shall be convicted more than once for the same offence. *s. 8.*

Killing herrings in the day-time.

22. No person shall in the day time (that is to say) from sun-rise to sun-set, fish for, or kill any herrings, in any harbour, on any coast in this kingdom, by casting of any net for that purpose, under the penalty of forfeiting five pounds for each offence, to be recovered in manner herein before mentioned. *s. 9.*

Proprietors of fisheries.

23. Also by the 3. G. 3. c. 35. No person, except the respective proprietors and farmers of the said respective rivers and salmon fisheries, shall at any time between the twelfth day of *August*, and first day of *February* in any year, fish in any of the said rivers (or in the river *Earn*, or salmon fishery of *Ballyshannon*, between the twelfth day of *August*, and the first day of *May*, with any net, rod, or any other instrument whereby salmon fish may be taken or killed, or carry a rod, gaff, loop-net, lister, or spear, or any other instrument, whereby fish may be killed or taken on the banks of any of the said rivers. *s. 1.*

Penalty of five pounds.

24. And if any person shall offend herein, every such offender being thereof convicted by confession or by the testimony of any one credible witness upon oath, before some one justice of the peace for the county where such offence shall be committed, shall for every such offence forfeit five

five pounds, over and above the boat and nets, the same to be levied by the warrant of such justice by distress and sale of the offenders goods, and to be paid to the informers.

25. And if no sufficient distress can be found, the offender shall by the like warrant be committed to the county gaol, there to remain without bail or mainprize for such time not exceeding three months, nor less than one month, as such justice shall appoint, unless such forfeiture shall in the mean time be paid, in which case the offender shall be enlarged.

Committal.

26. No person (except the proprietors and farmers of the said several salmon fisheries, and their respective fishermen) shall make use of any boat, or fish with any nets of any kind, that shall have a sole, rope or ropes, with sinks of any kind thereunto fixed, or make use of any other instrument for taking or killing of salmon within the limits of the said several salmon fisheries throughout this kingdom. *f. 2.*

Using nets with a sole,

27. And if any (except the said proprietors and farmers, and their fishermen by them respectively employed) shall offend herein, every such offender being thereof convicted as aforesaid, shall forfeit five pounds, together with the boat or boats, net or nets, with all and every other instrument made use of in committing such offence, the same to be recovered and disposed of in manner herein before directed.

Penalty of five pounds,

28. And the limits and bounds of every salmon fishery in this kingdom, are hereby deemed and understood to be such as have been severally held, possessed, and enjoyed, by the respective proprietors, and farmers deriving under them, for thirty one years past.

Limits of fisheries,

29. *Whereas the proprietor and his tenants and farmers of the salmon fishery of Sligo are continually disturbed in the property of the said salmon fishery:* no person (except the proprietor, his tenants and farmers, of the salmon fishery aforesaid) shall make use of any boat, or of any nets that will have a sole rope with sinks affixed thereunto, nor of any other instrument where-with salmon may be taken or killed in the said river, from the salmon wear above the town of *Sligo*; down to the oyster island; and if any person shall offend herein, every such offender, for every such offence, shall forfeit five pounds, together with the boats or nets, and all other sorts of instruments used by them in such offence; to be recovered and disposed of in manner herein before mentioned. *f. 3.*

Fishery of Sligo,

30. *Whereas in the river of Loughfoyle in the counties of Londonderry, Donegal, and Tyrone, salmon fish in the months of July and August are known to be in the greatest plenty and highest season.* it shall be lawful for the proprietors of the several fisheries in the said river of *Loughfoyle*, and for the the persons employed by or acting under them to continue to fish until the first day of *September* in every year henceforward. *f. 4.*

Fishery of Loughfoyle.

31. And by 3 G. 3. c. 24. No nets shall be shot or wet for the taking of herrings in the day time, under a penalty of five pounds, to be recovered against the owners of such net, or of the said bus or vessel, and to be levied by distress and sale of their goods, by warrant under the hand and seal of a justice of peace of the county wherein the parties do reside, and before whom the offence shall be proved, by confession, or the oath of two credible witnesses. *f. 2.*

Fishing for herrings in the day-time.

Fish and Fishing.

32. Which penalty when recovered shall be applied in manner following, (that is to say) one moiety thereof to the use of the poor of the parish, where the persons so forfeiting shall reside, and the other moiety to the use of the persons who shall sue for the same.

Fishing on a Sunday.

33. No nets shall be shot, nor any boats go out to look for fish from sun set on any *Saturday* night until after sun set on *Sunday* night, immediately following, under the penalty of five pounds, to be recovered and applied in like manner as herein before is mentioned. *s. 3.*

Shooting at whales.

34. If any persons in small vessels not decked, and not belonging to some ship actually employed in the whale fishery, shall shoot from guns, at any whales, they shall for every such offence forfeit to his Majesty the boat in which such offence was committed, together with the penalty of twenty pounds, to be recovered and applied as aforesaid. *s. 6.*

IV. Of packing fish.

Vessels for packing herrings.

1. By the 7 G. 2. c. 11. No persons shall buy or sell any barrels for packing of white herrings for exportation, or shall pack up herrings in any barrels for exportation, unless the same be made of staves not less than three eighths of an inch in thickness, and free from sap, and each barrel bound with sixteen sufficient hoops, and branded with the maker's name and the place of his abode. *s. 3.*

Examining and branding vessels.

2. And before such barrels *shall be sold, they* shall be examined by a publick officer to be appointed for that purpose, by every city, town corporate or place which are already impowered to appoint weigh-masters, which officer to be appointed or his deputy shall examine such barrels, and upon finding them conformable to this act, the said officer or his deputy is required to brand on the head, side, and bottom of such barrels, the first letter of his christian name and his surname at length, with the name of the city, town corporate or place, where such barrels shall be examined, which barrels so branded shall be only sold in some publick market.

Penalty on buyer and seller.

3. And in case any persons shall buy or sell barrels not branded as aforesaid, or in any other place than in some market town, or shall pack up any herrings in any barrels made contrary to the directions of this act, or not branded as is hereby directed, the buyer and seller shall respectively for every barrel so sold or bought forfeit twenty shillings, and the persons in whose custody any herrings are found packed up for exportation in any barrels contrary to the directions of this act, shall forfeit twenty shillings, which several forfeitures shall be recovered and applied in such manner and to such uses as other forfeitures herein before mentioned.

A warrant to levy the forfeiture for keeping engines to kill
Salmon.

To the constable of —, and to the keeper of the house of correction at K.

County of } **F**ORASMUCH as A. B. of C. in the county aforesaid,
—to wit. } was this present day brought before me, for having in his
custody a spear for killing salmon, and also engines fit for taking salmon-
fry, contrary to the form of the statute in that case made and provided; and
the said A. B. hath also this day been duly convicted thereof, before me, upon
the oath of C. D. of C. aforesaid, by reason whereof the said A. B. hath for-
feited the sum of twenty shillings: These are therefore, in his Majesty's name,
to command you forthwith to levy the said sum of twenty shillings, on the
goods and chattels of the said A. B. by distress and sale thereof, rendering the
overplus, if any be, and that you pay the same to the said C. D. who in-
formed me of the said offence; and for want of a sufficient distress, that you
do take and apprehend the said A. B. and convey him to the said house of cor-
rection at K. and there deliver him to the keeper thereof, together with this
warrant, commanding also you the said keeper to receive the said A. B. into
your custody, and to give him due correction, according to law, and to keep
him there to hard labour for the space of fifteen days: Hereof fail not at
your perils. Given —.

A warrant to levy the forfeiture for killing salmon with nets, be-
tween the first of August, and first of February.

To the constable of —.

County of } **F**ORASMUCH as it hath been duly proved before me this
—to wit. } day, upon oath, that A. B. of C. in the county aforesaid,
did, on the first day of November last at C. aforesaid, take [or kill] with a
net, [or, engine] one salmon, contrary to the form of the statute in that case
made and provided, whereby he hath forfeited the sum of twenty shillings, and
the said net: [or, engine] these are therefore, in his Majesty's name, to command
you, forthwith to seize the said net, [or, engine] and sell the same; and also
to levy the said sum of twenty shillings on the goods of the said A. B. by
distress and sale thereof, rendering the overplus; and that you pay one moiety
of the said twenty shillings, and one moiety of the money arising by the sale of
the said net [or, engine] to C. D. of C. aforesaid, who informed me of
the said offence, and the other moiety to the church wardens of the parish
of C. aforesaid, for the use of the poor of the said parish. Hereof fail not.
Given —

Fish and Fishing.

A warrant to levy the forfeiture for fishing with the face disguised.

To the constable of ——— and to the keeper of the house of correction at K.

County of } **F**ORASMUCH as it hath this day been duly proved
—to wit. } before me upon oath, that A. B. of C. in the county
aforesaid, was, on the second day of this instant August, found fishing at C.
aforesaid, with his face disguised, [or, found in, upon, or near the river C.
with his face disguised] contrary to the form of the statute in that case made
and provided, whereby he hath forfeited the sum of forty shillings: these are
therefore, in his Majesty's name, to command you forthwith to levy the said
sum of forty shilling on the goods and chattels of the said A. B. by distress
and sale thereof, rendering the overplus; and that you pay one moiety thereof
to C. D. of C. aforesaid, who informed me of the said offence, and the other
moiety to the church wardens of the parish of C. aforesaid, for the use of the
poor of the said parish. And if no sufficient distress can be found, you are
hereby required to take and apprehend the said A. B. and commit him to the
custody of the keeper of the said house of correction: and you, the said keeper,
are hereby required to take the said A. B. into your custody, and to keep him at
hard labour, with due correction, for the space of thirty one days. Hereof fail
not at your perils. Given ———

A warrant to levy the forfeiture for killing twelve salmon-fry in
one day in March.

To the constable of ———, and to the keeper of his Majesty's gaol
at K——.

County of } **F**Orasmuch as it hath been this been day duly proved before
—to wit. } me, upon oath, that A. B. of C. in the county aforesaid, did,
in one day, to wit, on the tenth day of March last, at C. aforesaid, take [or kill]
twelve salmon-fry, contrary to the form of the statute, whereby he hath for-
feited the sum of ten shillings: these are therefore, in his Majesty's name, to
command you forthwith to levy the said sum of ten shillings on the goods of
the said A. B. by distress and sale thereof, rendering the overplus; and that you
pay one moiety thereof to C. D. of C. aforesaid, who informed me of the said of-
fence, and the other moiety to the church wardens of the parish of C. aforesaid,
for the use of the poor of the said parish; and if no sufficient distress can be had,
you are hereby required to take and apprehend the said A. B. and commit him to
the custody of the keeper of the said gaol at K. to be kept there for nine days:
and you the said keeper are hereby required to take the said A. B. into your
custody, and to keep him for the space of nine days: hereof fail not at your perils.
Given ———

A warrant to levy the forfeiture for drudging for oysters between the first of *May*, and the twentieth of *August*.

To the constable of —, and to the keeper of his Majesty's gaol at K—.

County of } **W**HEREAS, complaint was made upon oath before me, —to wit. } that A. B. of C. in the county aforesaid, did, at C. aforesaid, between the first day of *May*, and the twentieth day of *August*, in this present year, to wit, on the first day of *July* last drudge for oysters, contrary to the form of the statute in that case made and provided; and it having also been proved before me this day upon oath, that the said A. B. was duly served with a summons to appear before me, to answer the premisses, and he, having neglected to appear, I proceeded this day to examine the said complaint, and it having been duly proved before me, by the oaths of C. D. of E. and F. G. of H. in the county aforesaid, that the said A. B. is guilty of the said offence, whereby he hath forfeited the sum of forty shillings: these are therefore, in his Majesty's name, to command and require you forthwith to levy the said sum of forty shillings on the goods of the said A. B. by distress and sale thereof, returning to him the overplus, if any be; and that you pay one moiety thereof to the said C. D. who informed me of, and prosecuted the said A. B. for the said offence, and the other moiety to the church wardens of the parish of C. aforesaid, where the said A. B. lives, for the use of the poor of the said parish; and if no sufficient distress can be had, you are to take and apprehend the said A. B. and deliver him safely to the said keeper of his Majesty's gaol, at K. aforesaid, there to remain for the space of thirty days, unless he shall sooner pay the said penalty: and you, the said keeper, are hereby required to take the said A. B. into your custody, and him safely to keep during that time, unless he shall sooner pay the said penalty: hereof fail not. Given —

A warrant to search for and seize fishing-nets.

To the constable of —

County of } **W**HEREAS complaint hath this day been made unto me, —to wit. } upon oath, by A. B. of C. in the county aforesaid, that several trouts, and other fish have been lately taken out of the river of C. aforesaid, belonging to the said A. B. as owner of the royalty thereof, and supposed to be taken by some idle persons in your parish: and that several persons within your parish do keep nets, leaps, and other instruments and engines, for the destruction of fish, who are not qualified by law, to keep or have the same, and contrary to the statute, in that case made and provided: these are therefore to command you to enter into and search the houses, out-houses, and other suspected places, of all such persons, within your said parish, whom you shall justly suspect, or be informed, to have any nets, or other instruments
or

Fish and Fishing.

or engines, for taking or destroying of fish, and to seize the same, wherever you shall find them; and to bring the person or persons, in whose house or possession they shall be found, before me, or some other of his Majesty's justices of the peace for this county, to be dealt with according to law. Given —

Forcible entry and detainer.

FORCE in the common law, is most commonly taken in ill part, for unlawful violence. 1 *Inst.* 161.

It seems that at the common law, a man disseised of any lands or tenements, if he could not prevail by fair means, might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to re-enter in due time; and it seems certain, that even at this day, he who is wrongfully dispossessed of his *goods*, may justify the retaking of them by force from the wrong doer, if he refuse to re-deliver them; for the violence which happens thro' the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought. 1 *Haw.* 140.

But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the publick peace, by giving an opportunity to powerful men under the pretence of feigned titles, forcibly to eject their weaker neighbours, and also by force to retain their wrongful possessions, it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice. 1 *Haw.* 141.

However even at this day, in an *action* of forcible entry grounded on those laws, if the defendant make himself a title which is found for him, he shall be dismissed without any inquiry concerning the force; for howsoever he may be punishable *at the king's suit*, for doing what is prohibited by statute, as a contemner of the laws, and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. 1 *Haw.* 141.

Since therefore offences of this nature are made such, not by the common law, but by statute (after having premised, that *they who keep possession with force, in lands and tenements, whereof they or their ancestors, or they whose estate they have in the same, have continued their possession in the same, by three whole years next before without interruption, shall not be endangered by force of any of the statutes concerning forcible entry, 8 H. 6. c. 9. f. 7.* 1 *Haw.* 152.) I shall consider those several statutes, with the interpretation that hath been put upon them, under the following heads:

I. *What*

- I. *What is a forcible entry.*
- II. *What is a forcible detainer.*
- III. *How the same are punishable by action at law.*
- IV. *How punishable at the general sessions.*
- V. *How punishable by one justice.*
- VI. *How punishable on a certiorari.*
- VII. *How punishable as a riot.*

I. *What is a forcible entry.*

By the 5 R. 2. c. 8. *None shall make any entry into any lands or tenements (or benefices of holy church, 15 R. 2. c. 2. or other possessions, 8 H. 6. c. 9. f. 2.) but where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; on pain of imprisonment and ransom at the king's will.*

Or other possessions] It seems clear, that no one can come within the danger of these statutes, by a violence offered to another in respect of a way, or such like easement, which is no possession. And there seems to be no good authority, that an indictment will lie in this case for a *common*, or *office*. 1 Haw. 146.

Not with strong hand, nor with multitude of people] It seems certain, that if one who pretends a title to lands, barely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act, which either expressly or impliedly amounts to a claim of such lands, he cannot be said to make an entry thereinto. 1 Haw. 144.

But it seemeth, that if a person enter into another man's house, or ground, either with apparent violence offered to the person of any other, or furnished with weapons or company, which may offer fear, tho' it be but to cut, or take away another man's corn, grass, or other goods, or to fell or crop wood, or do any other like trespass, and tho' he do not put the party out of his possession, yet it seemeth to be a forcible entry. Dalt. c. 126.

But if the entry were peaceable, and after such entry made, they cut or take away any other man's corn, grass, wood, or other goods, without apparent violence or force; tho' such acts are counted a disseisin with force, yet they are not punishable as forcible entries. Dalt. c. 126.

But if he enter peaceably, and there shall by force or violence cut or take away any corn, grass, or wood, or shall forcibly or wrongfully carry away any other goods there being; this seemeth to be a forcible entry punishable by these statutes. Dalt. c. 126.

Forcible entry and detainer.

So also shall those be guilty of a forcible entry, who having an estate in land, by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto.

1 *Haw* 145.

But he who barely agrees to a forcible entry made to his use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he no way concurred in, or promoted the force. 1 *Haw* 145.

And, in general, it seemeth clear, that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual *violence*, or *terror*; and therefore that an entry which hath no other force than such as is implied by the law, in every trespass whatsoever, is not within these statutes.

1 *Haw* 145.

As to the matter of *violence*; it seems to be agreed, that an entry may be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods; but it seems that an entry is not forcible, by the bare drawing up a latch, or pulling back the bolt of a door, there being no appearance therein of being done by *strong hand*, or *multitude of people*; and it hath been holden, that an entry into a house thro' a window, or by opening a door with a key, is not forcible. 1 *Haw* 145.

In respect of the circumstances of *terror*; it is to be observed, that wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession just cause to fear, that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror, by carrying with him such an unusual number of attendants, or by arming himself in such a manner, as plainly intimates a design, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches, as plainly imply a purpose of using force, as if one say that he will keep his possession in spite of all men, or the like. 1 *Haw* 145.

But it seems that no entry shall be judged forcible, from any threatening to spoil another's *goods*, or to destroy his cattle, or to do him any other such like damage, which is not personal. 1 *Haw* 146.

However it is clear, that it may be committed by a single person, as well as by twenty. 1 *Haw* 146.

But nevertheless all those who accompany a man, when he makes a forcible entry, shall be judged to enter with him, whether they actually come upon the lands or not. 1 *Haw* 144.

II. What is a forcible detainer.

It seemeth certain, that the same circumstances of violence or terror which will make an entry forcible, will make a detainer forcible also. And a detainer may be forcible, whether the entry were forcible or not. 1 Haw. 146.

III. How they are punishable by action at law.

If any person be put out or disseised of any lands or tenements in forcible manner, or put out peaceably, and after holden out with strong hand the party grieved shall have assize of novel disseisin, or a writ of trespass against the disseisor; and if he recovers, he shall have treble damages, and the defendant moreover shall make fine and ransom to the king. 8 H. 6. c. 9. f. 6.

The party grieved shall have assize, &c.] But this action, being at the suit of the party, and only for the right, is only where the entry of the defendant was not lawful, for if a man entereth with force, where his entry is lawful, he shall not be punished by way of action; but yet he may be indicted upon the statute, for the indictment is for the force, and for the king, and he shall make fine to the king, altho' his right be never so good. Dalt. c. 129.

Treble damages] And this he shall recover, as well for the mean occupation, as for the first entry: and albeit he shall recover treble damages, yet he shall recover costs, which shall be trebled also; for the word *damage* includeth costs of suit. 1 Inst. 257.

IV. How punishable at the general sessions.

The party grieved, if he will lose the benefit of his treble damages and costs, may be aided and have the assistance of the justices at the general sessions, by way of indictment (A) on the statute of 8 H. 6. Which being found there, he shall be restored to his possession, by a writ of restitution granted out of the same court to the sheriff. Dalt. c. 129.

In the caption of which indictment, it will be sufficient to say, *justices assigned to keep the peace of our lord the king*, without shewing that they have authority to hear and determine felonies and trespasses; for the statute enables all justices of the peace, as such, to take such indictments. 1 Haw. 147.

And the tenement in which the force was made, must be described with convenient certainty; and must set forth that the defendant actually entred, and ousted the party grieved; and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 Haw. 147, 149, 150.

Forcible entry and Detainer.

But if a man's wife, children, or servants, do continue in the house or upon the land, he is not ousted of his possession; but his cattle being upon the ground do not preserve his possession. *Dalt. c. 132.*

An indictment for forcible entry was quashed, for not setting forth, that the party was seised or disseised, or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid into the freehold of *A.* in the possession of *B.* 3 *Salk.* 169.

V. How punishable by one justice.

1. For a more speedy remedy, the party grieved may complain to any one justice; or to a mayor, sheriff, or bailiff, within their liberties. 8 *H.* 6. c. 9.

2. But altho' one justice alone may proceed in such cases, yet it may be adviseable for him, if the time for viewing the force will suffer it, to take to his assistance one or two more justices.

3. Concerning which power of one justice, it is enacted as follows:

After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements, or other possessions, or forcible holding thereof, he shall within a convenient time, at the costs of the party grieved (without any examining or standing upon the right or title of either party) take sufficient power of the county, and go to the place where such force is made. 15 *R.* 2. c. 2. 8 *H.* 6. c. 9. f. 2. *Dalt. c. 44.*

Complaint——by the party grieved] Yet these words do not inforce any necessity of such a complaint; for it is holden, that the justice may and ought to proceed, upon any information or knowledge thereof whatsoever, tho' no complaint at all be brought unto him, by any party grieved thereby. *Lamb.* 147.

Power of the county] All people of the county, as well the sheriffs as other, shall be attendant on the justices, to arrest the offenders; on pain of imprisonment and fine to the king. 15 *R.* 2. c. 2.

4. And if the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house, to remove the force. *Dalt. c. 44.*

5. And if after such entry made, the justice shall find such force; he shall cause the offenders to be arrested. 15 *R.* 2. c. 2. 8 *H.* 6. c. 9. f. 2.

6. He shall also take away their weapons and armour, and cause them to be appraised, and after to be answered to the king as forfeited, or the value thereof. 2 *Ed.* 3. c. 3.

7. Also such justice ought to make a record (B) of such force by him viewed; which record shall be a sufficient conviction of the offenders, and the parties shall not be allowed to traverse it: and this record, being made out of the sessions by a particular justice, may be kept by him; or he may make it indented, and certify the one part into the king's bench, or leave it with the clerk of the peace; and the other part he may keep himself. For this view of the force by the justice, being a judge of record, maketh his record thereof, in the judgment of the law, as strong and effectual, as if the offenders

offenders had confessed the force before him; and touching the restraining of traverse more effectual, than if the force had been found by a jury, upon the evidence of others. (That is, as to the fine and imprisonment, but not as to restitution.) 15 R. 2. c. 2. Dalt. c. 44.

8. And the offenders, being arrested (as before is said), *shall be put in the next gaol, (C) there to abide convict by the record of the same justice, until they have made fine and ransom to the king.* 15 R. 2. c. 2.

Shall be put in the next gaol] It is said, that the justice hath no power to commit the offender to gaol, unless he do it upon his own view of the fact, and not upon the jury finding the same afterwards. Dalt. c. 44. 1 Haw. 142.

And if such offenders, being in the house at the coming of the justice, shall make no resistance, nor make shew of any force, then the justice cannot arrest or remove them at all upon such view. Dalt. c. 44.

But howsoever, if the force be found afterwards, by the inquiry of the jury, the justices may bind the offenders to the peace; and if they be gone, he may make his warrant to take them, and may after send them to the gaol, until they have found sureties for the peace. Dalt. c. 44.

Note; Mr. Dalton in this place says *good behaviour*, which I have presumed to alter to *the peace*, as deeming it much the safer; and not being sufficiently satisfied concerning the power of a justice of the peace to bind to the good behaviour in the like cases, which power Mr. Dalton hath enlarged more than all other authors, without any assistance from the commission of the peace, or any act of parliament, other than had been for above 200 years before.

Until they have made fine] H. 1 G. 2. K. and Sir Edm. Ellewell. He was brought up upon a *habeas corpus*, with a return of the cause of his commitment, which was upon a conviction of forcible entry and detainer. And it being moved to discharge him upon exceptions to the commitment, the court refused to enter into the consideration of them, till the conviction was likewise regularly removed before them. But by consent he was bailed in the mean time. And this term the conviction being before the court, it appeared that there was no fine set by the justices, and it was therefore moved to be quashed. It was agreed on both sides, that there should be a fine; but it was insisted, that it being now before the king's bench by a certiorari, they might set the fine. But by the court, We are not to execute the judgment of an inferior court. The conviction is to be upon view, and they who view the nature of the force are the properest judges what fine to set; and though a certiorari should come before the fine is set, yet it would be no contempt in the justices to compleat their judgment by setting one. Lambard indeed was of opinion, that the justices could not set the fine at all; but upon what foundation we can never imagine. The justices are not bound to do it upon the spot, but may take a reasonable time to consider of the fine; because by the words of the act, the commitment is to be, till he has paid the fine. The conviction must be quashed, and the defendant discharged. Str. 794. L. Raym. 1515. Sess. C. V. 1. 289.

Forcible entry and detainer.

And the same was likewise solemnly resolved in *Leighton's* case; and that the justice may assess the same, either before the commitment or after. *1 Haw. 142.*

And the fine must be assessed upon every offender severally, and not upon them jointly; and the justice ought to estreat the fine, and to send the estreat into the exchequer, that from thence the sheriff may be commanded to levy it for his majesty's use. *Dalt. c. 44.*

But upon payment of the fine to the sheriff, or upon sureties found (by recognizance) for the payment thereof, it seemeth that the justice may deliver the offenders out of prison again at his pleasure. *Dalt. c. 44.*

9. And so much concerning removing the force: But the party ousted cannot be restored to his possession by the justice's view of the force, nor unless the same force be found by the inquiry of a jury.

Concerning which it is enacted as follows: *And tho' that the persons making such entry be present, or else departed before the coming of the justice; he may notwithstanding in some good town next to the tenements so entred, or in some other convenient place by his discretion (and that, tho' he go not to see the place where the force is; Dalt. c. 44.) have power to enquire by the people of the county, as well of them that make such forcible entry, as of them which hold the same with force. 8 H. 6. c. 9. s. 3.*

10. In order to which, the justice shall make his precept (D) to the sheriff, commanding him in the king's behalf, to cause to come before him, sufficient and indifferent persons, dwelling next about the lands so entred, to enquire of such entries; whereof every man shall have lands or tenements of 40s. a year, above reprises. And the sheriff shall return issues on every of them, at the day of the first precept returnable 20s. and at the second day 40s. and at the third 100s. and at every day after double. And the sheriff making default, shall, on conviction before the same justice, or before the judge of assize, forfeit 20l. half to the king, and half to him who shall sue, with costs; and moreover shall make fine and ransom to the king. *8 H. 6. c. 9. s. 4, 5.*

Before the same justice] And the justice may proceed against the sheriff for this default, either by bill at the suit of the party, or by indictment at the suit of the king. *Dalt. c. 44.*

11. And the defendant also, if he is not present, ought to be called to answer for himself; for it is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself. *1 Haw. 154.*

12. And it seems to be settled at this day, that if the defendant tender a traverse of the force, the justice ought not to make any restitution, till the traverse be tried. *1 Haw. 154.*

13. By the act 10 Car. 1. sess. 2. cap. 13. sect. 1. The defendant may also plead *three years possession*; whereby it is enacted, that no restitution upon an indictment of forcible entry, or holding with force, shall be made, if the person indicted have had the occupation, or been in quiet possession for three years together next before the indictment found, and his estate therein not determined; and restitution shall stay till that be tried: and if it is found against the party indicted, he shall pay such costs and damages as the judges or justices shall assess; to be recovered

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covered as costs and damages in judgments on other actions. Eng. stat. 31 Eliz. cap. 11.

And it hath been holden, that the plea of such possession is good, without shewing under what title, or of what estate such possession was; because it is not the title, but the possession only, which is material in this case. 1 Haw. 152.

14. And it was holden by the court in *Leighton's case*, that if the defendant shall either traverse the entry or the force, or plead that he has been three years in possession, the justice may summon a jury for the trial of such traverse, for it is impossible to determine it upon view; and if the justice have no power to try it, it would be easy for any one to elude the statute by the tender of such a traverse, and therefore by a necessary construction the justice must needs have this power as incidental to what is expressly given him. 1 Haw. 142.

15. And this traverse must be tendered in writing, and not by a bare denial of the fact in words; for thereupon a *venire facias* must be awarded, a jury returned, the issue tried, a verdict found, and judgment given, and costs and damages awarded; and there must be a record, which must be in writing, to do all this, and not a verbal plea. *Dalt. c. 133.* 1 Haw. 154.

16. Upon which traverse tendred, the justice shall cause a new jury to be returned by the sheriff, to try the traverse; which may be done the next day, but not the same day. *Dalt. c. 133.*

17. And it seemeth, that he who tendreth the traverse, shall bear all the charges of the trial; and not the king, or the party prosecuting. *Dalt. c. 133.*

18. *And if such forcible entry or detainer be found (E) before such justice, then the said justice shall cause to reseiſe (F) the lands and tenements so entred or holden, and shall restore the party put out, to the full possession of the same.* 8 H. 6. c. 9. f. 3.

The said justice] It seems to be agreed, that no other justices of the peace, except those before whom the indictment shall be found, shall have any power either at the sessions or out of it, to make any award of restitution. 1 Haw. 152.

Shall cause to reseiſe] And the justice may break open the house by force, to reseiſe the same; and so may the sheriff do, having the justice's warrant. *Dalt. c. 44.*

Reseiſe] That is, shall remove the force, by putting out all such offenders as shall be found in the house, or upon the lands, that entred or held with force. *Dalt. c. 130.*

And shall restore the party put out] And this he may do in his own proper person; or he may make his warrant to the sheriff to do it. *Dalt. c. 44.* 1 Haw. 151, 2.

19. And by 10 Car. 1. sess. 3. cap. 13. sect. 2. Such judges, justices, or justice of the peace, as may give restitution unto tenants of any estate of free hold, may give the like unto tenants for term of years, tenants by copy of court roll,

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roll, guardians by knight's service, tenants by elegit, statute merchant and staple, of lands or tenements by them so holden, which shall be entred upon by force, or holden from them by force. Eng. stat. 21 Jac. 1. cap. 15.

VI. How punishable on a certiorari.

Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment shall be certified by the justice or justices into the king's bench, or the same presentment or indictment be removed and certified thither by certiorari, the justices of that court may award a writ of restitution to the sheriff, to restore possession to the party expelled: for the justices of the king's bench have a supreme authority in all cases of the crown. *Dalt. c. 44.*

Also where upon a removal of the proceedings into the king's bench the conviction shall be quashed, the court will order restitution to the party injured. As in the case of *K. and Jones, M. 8 G.* A conviction of forcible entry was quashed for the old exception of *messuage* or *tenement*, by reason of the uncertainty; but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction. But the court said, they had no discretionary power in this case, but were bound to award restitution on quashing the conviction. *Str. 474.*

VII. How punishable as a riot.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no enquiry hath before been made of the force. *Dalt. c. 44.*

A. Indictment for a forcible entry and detainer at common law.

Dublin. **T**HE jurors for our lord the king, upon their oath present, that A. O. late of——in the county aforesaid, gentleman, and B. O. late of the same, yeoman, together with divers other malefactors and disturbers of the peace of our said lord the king (whose names to the jurors aforesaid are yet unknown) on the——day of——in the——year of the reign of——with force and arms, at——aforesaid, in the county aforesaid, unlawfully and injuriously did enter into a certain barn and a certain orchard, then and there being in the possession of one A. I. and that the said A. O. and B. O. together with the said other malefactors, then and there, with force and arms, unlawfully and injuriously did expel, amove, and put out the said A. I. from the possession of the said barn and orchard, and the said A. I. so as aforesaid expelled, amoved, and put out from the possession of the said barn and orchard, then and there, with force and arms, unlawfully and injuriously did keep out, and still do keep out, to the great damage of him the said A. I. and against the peace of our said lord the king, his crown and dignity.

Indictment

Indictment on the statute.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. I. late of the parish of _____ in the county aforesaid, gentleman, on the _____ day of _____ in the _____ year of the reign of _____ was possessed of a certain messuage, with the appurtenances, situate, lying, and being in _____ in the parish aforesaid, in the county aforesaid, for a certain term of years, then and still to come, and unexpired, and being so possessed thereof, one A. O. late of _____ in the said county, yeoman, afterwards, to wit, the said _____ day of _____ in the year aforesaid, into the same messuage, with the appurtenances aforesaid, in _____ aforesaid, in the parish and county aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said A. I. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there, with force and arms, and with strong hand, unlawfully did expel and put out, and the said A. I. from the possession thereof, so as aforesaid, with force and arms, and with strong hand, being unlawfully expelled and put out, the said A. O. him the said A. I. from the aforesaid _____ day of _____ in the year aforesaid, until the day of the taking this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously then and there did keep out, and still doth keep out, to the great damage of the said A. I. against the peace of our said lord the king, and against the form of the statutes in that case made and provided.

Note; If it is a freehold, then the party must be said to be *seised* thereof in his demesne as of fee; and consequently he must be thereof *disseised*: otherwise if it is of a lesser estate, of which he is not properly said to be *seised*, but possessed thereof at the will of the lord, according to the custom of the manor, or the like, and then he must be *expelled*, *ejected*, *amoved*, or the like.

B. Record of a forcible detainer upon view.

Note; The books upon the office of a justice of the peace do generally set forth, that the record ought to be in the present tense, and not in the time past (and herewith do accord the adjudged cases in the court of king's bench, *Str.* 443.); yet nevertheless they do all exhibit the form of a record in the time past, and not in the present: Therefore I have taken the liberty to alter the same, from the record in *L. Raymond* of the conviction of *Sir Edm. Elwell* aforesaid, and others; adding the fine thereunto, for the want of which, that conviction was quashed. And I have given the form of a record of a forcible *detainer*, rather than of a forcible *entry*, because the justice for the most part cannot be supposed to be present at the entry, as not having knowledge thereof until after the entry is made.

Dublin. **B**E it remembred, that on the 15th day of Sept. in the first year of to wit. the reign of our sovereign lord George the second of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at _____ in

Forcible entry and detainer.

— in the county of Dublin aforesaid, Eliz. Elwell, complained to us Sir E. Bettenfon, baronet, P. Burrel and W. Passenger, esquires, three of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, that Sir Edm. Elwell, late of —, baronet, Joseph Billers, late of — and Daniel Monty, late of — into the messuage of her the said E. E. being the mansion house of her the said E. E. called —, situate within the parish of — aforesaid, did enter, and her the said E. E. of the messuage aforesaid, whereof the said E. E. at the time of the entry aforesaid, was seised as of the freehold of her the said E. E. for the term of her life, unlawfully ejected, expelled, and amoved, and the said messuage from her the said E. E. unlawfully, with strong hand and armed power, do yet hold and from her detain, against the form of the statute in such case made and provided; whereupon the same E. E. then, to wit, on the said 15th day of Sept. at the parish of B. aforesaid, prayeth of us, so as aforesaid being justices, to her in this behalf that a due remedy be provided, according to the form of the statute aforesaid:

Which complaint and prayer by us the aforesaid justices being heard, we the aforesaid E. B. baronet, P. B. and W. P. esquires, justices aforesaid, to the messuage aforesaid personally have come, and do then and there find and see the aforesaid Edm. E. J. B. and D. M. the aforesaid messuage, with force and arms, unlawfully, with strong hand and armed power, detaining, against the form of the statute in such case made and provided, according as she the same E. E. so as is aforesaid hath unto us complained: Therefore it is considered by us the aforesaid justices, that the aforesaid Edmund Elwell, Joseph Billers and Daniel Monty, of the detaining aforesaid with strong hand, by our own proper view, then and there as is aforesaid had, are convicted, and every of them is convicted, according to the form of the statute aforesaid: Whereupon we the justices aforesaid, upon every of the aforesaid Ed. E. J. B. and D. M. do set and impose severally a fine of 10 l. of good and lawful money of Great Britain, to be paid by them and every of them severally to our said sovereign lord the king, for the said offences; and do cause them, and every of them, then and there to be arrested; and the same Ed. E. J. B. and D. M. being convicted, and every of them being convicted upon our own proper view, of the detaining aforesaid, with strong hand as is aforesaid, by us the aforesaid justices are committed, and every of them is committed, to the gaol of our said lord the king at — in the county of — aforesaid, being the next gaol to the messuage aforesaid, there to abide respectively, until they shall have paid their several fines respectively to our said lord the king, for their respective offences aforesaid. Concerning which the premisses aforesaid, we do make this our record. In witness whereof, we the aforesaid E. B. baronet, P. B. and W. P. esquires, the justices aforesaid, to this record our hands and seals do set, at the parish of B. aforesaid, in the county of — aforesaid, on the 15th day of Sept. in the first year aforesaid of the reign of our said sovereign lord the now king.

C. Mittimus for forcible detainer.

Dublin. **E**DWARD Hassel, esquire, one of the justices of our sovereign lord the king's majesty, assigned to keep the peace within the said county of D. and also to hear and determine divers felonies, trespasses, and other

Forcible entry and Detainer.

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other misdemeanors in the said county committed; to the keeper of his majesty's gaol at ——— in the said county, and to his deputy and deputies there, and to every of them, greeting. Whereas upon complaint made unto me this present day, by A. I. of ——— in the said county, yeoman, I went immediately to the dwelling house of the said A. I. at ——— aforesaid in the said county, and there found A. O. late of ——— labourer, B. O. late of the same, weaver, and C. O. late of ——— butcher, forcibly, with strong hand and armed power, holding the said house, against the peace of our said lord the king, and against the form of the statute in such case made and provided: therefore I send you, by the bringers hereof, the bodies of the said A. O. B. O. and C. O. convicted of the said forcible holding, by mine own view, testimony and record; commanding you in his said majesty's name to receive them into your said gaol, and there safely to keep them, and every of them respectively, until they shall have respectively paid the several sum of 10l. of good and lawful money of Great Britain, to our said sovereign lord the king, which I have set and imposed upon every of them separately, for a fine and ransom for their said trespasses respectively. Herein fail you not, at the peril that may follow thereof. Given at ——— aforesaid, in the county aforesaid, under my seal, the ——— day of ——— in the ——— year of the reign of our said sovereign lord king George the third.

Note, by the forms in all the books, all the offenders stand committed until all have paid, so as that the first shall not be discharged on payment of his own fine, but continue until all the rest have paid likewise; which seems unreasonable, and is not warranted by the statute.

D. Precept to the sheriff to return a jury.

Dublin. **H**ENRY Aglionby, esquire, one of the justices of our lord the king, assigned to keep the peace in the said county, and also to bear and determine divers felonies, trespasses and other misdemeanors in the said county committed; To the sheriff of the said county, greeting: on behalf of our said lord the king, I command you, that you cause to come before me at ——— in the county aforesaid, on the ——— day of ——— next ensuing, twenty-four sufficient and indifferent men, of the neighbourhood of ——— aforesaid, in the county aforesaid, every of whom shall have lands or tenements of 40s. yearly at the least, above reprises, to enquire upon their oaths for our said lord the king, of a certain entry made with strong hand (as it is said) into the messuage of one A. I. at ——— aforesaid, in the county aforesaid, against the form of the statute in such case made and provided. And you are to return upon every of the jurors by you in this behalf to be impanelled, 20s. of issues at the aforesaid day. And have you then there this precept. And this you shall in no wise omit, upon the peril that shall thereof ensue. Witness the said J. P. at ——— in the county aforesaid, the ——— day of ——— in the ——— year of the reign of ———.

Forcible entry and Detainer.

The jurors oath.

YOU shall true inquiry and presentment make of all such things as shall come before you, concerning a forcible entry [or detainer] said to have been lately committed in the dwelling house of — yeoman, at — in this county; you shall spare no one for favour or affection, nor grieve any one for hatred or ill-will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you: So help you God.

The oath that A. F. your foreman hath taken on his part, you and every of you shall truly observe and keep on your parts: So help you God.

E. The inquisition, indictment, or finding of the jury.

Dublin. **A**N inquisition for our sovereign lord the king, indented and taken at — in the said county, the — day of — in the — year of the reign of — by the oaths of — good and lawful men of the said county, before J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, who say upon their oaths aforesaid, that A. I. of — aforesaid, yeoman, long since lawfully and peaceably was seised in his demesne as of fee [if it is not freehold, then say, possessed] of and in one messuage, with the appurtenances, in — aforesaid, in the county aforesaid, and his said possession [and seisin] so continued until A. O. late of — yeoman, B. O. late of the same, yeoman, and C. O. late of the same, yeoman, and other malefactors unknown, the — day of — now last past, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter, and him the said A. I. thereof disseised, and with strong hand expelled; and him the said A. I. so disseised and expelled from the said messuage with the appurtenances aforesaid, from the said — day of — until the day of the taking of this inquisition, with like strong hand and armed power did keep out, and do yet keep out, to the great disturbance of the peace of our said lord the king, and against the form of the statute in such case made and provided.

We whose names are hereunto set, being the jurors abovesaid, do upon the evidences now produced before us, find the inquisition aforesaid true.

A. B.
C. D. &c.

F.

F. Warrant to the sheriff for restitution.

Dublin. **H**ENRY Fletcher, *esquire*, one of the justices of our sovereign lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; to the sheriff of the said county greeting: *Whereas* by an inquisition taken before me the justice aforesaid, at ——— in the county aforesaid, on this present ——— day of ——— in the ——— year of reign of ——— upon the oaths of ——— and by virtue of the statutes made and provided in cases of forcible entry and detainer, it is found, that A. O. late of ——— yeoman, and B. O. late of ——— yeoman, on the ——— day of ——— now last past, into a certain messuage, with the appurtenances, of A. I. of ——— aforesaid, in the county aforesaid; gentleman, situate, lying, and being at ——— aforesaid, in the county aforesaid, with force and arms did enter, and him the said A. I. thereof then with strong hand did disseise and drive out, and him the said A. I. thus driven out from the aforesaid messuage with the appurtenances, from the ——— day of ——— aforesaid, to this present day of the taking of the said inquisition, with strong hand and armed force did keep out, and do yet keep out, as by the inquisition aforesaid more fully appeareth of record: therefore on the behalf of our said sovereign lord the king, I charge and command you, that taking with you the power of the county (if it be needful) you go to the said messuage and other the premisses, and the same with the appurtenances you cause to be resealed, and that you cause the said A. I. to be restored and put into his full possession thereof, according as he, before the entry aforesaid was seised, according to the form of the said statutes. And this you shall in no wise omit, on the penalty thereon incumbent. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the ——— year of the reign of ———.

Foreign service.

1. **B**Y the *Brit. stat.. 23 G. 2. c. 13.* If any persons shall contract with or endeavour to persuade or seduce, &c. any artificers in the manufactures of *Great Britain* or *Ireland*, to go out of this kingdom, or out of *Ireland*, into any foreign country, not belonging to the crown of *Great Britain*, and be convicted thereof, upon indictment or information brought in the king's bench at *Westminster*, &c. if the offence be committed in *England*, or by indictment or information in the king's bench at *Dublin*, if the offence be committed in *Ireland*, he shall for every artificer so contracted with or solicited, &c. forfeit five hundred pounds, and be imprisoned in the common gaol of the place where he shall be convicted for twelve months and until payment of the forfeiture, and in case of a further conviction upon a second or other subsequent offence of the same kind, he shall forfeit one thousand pounds for every such artificer contracted with or seduced, &c. by him, and suffer two years imprisonment and until payment of the forfeiture.

Seducing artificers,

Forfeit five hundred pounds.

sect. 1.

Prosecution in
twelve months.

Transporting
tools, &c.

Seizure by any
officer, &c.

Masters of ves-
sels,

Officers of the
revenue,

Suit within six
months.

Enlisting in fo-
reign service.

2. Provided that all prosecutions for offences against this act shall be commenced within twelve months after the fact committed. *f. 2.*

3. If any person in *Great Britain* or *Ireland*, shall upon any pretence, load or put on board any vessel not bound directly to some place in *Great Britain* or *Ireland*, or to some other dominions belonging to the crown of *Great Britain*, any tools or utensils or any parts thereof used in or proper for the woollen or silk manufactures, he shall forfeit the same and two hundred pounds, to be recovered in any of the courts at *Westminster*, &c. or in any of the four courts at *Dublin*, &c. *f. 3.*

4. Any officer of the customs in *Great Britain*, and of the revenue in *Ireland*, may seize and secure in some of the king's warehouses, all such tools or utensils prohibited to be exported, as shall be found on board any vessel or boat, not bound directly to some place of *Great Britain* or *Ireland*, or to some other of the dominions of the crown of *Great Britain*, and the same after legal condemnation, shall be publickly sold to the best bidder; one moiety of the produce to go to the king, and the other moiety to the officer, &c. *f. 4.*

5. If the master of any vessel or boat in *Great Britain* or *Ireland*, shall knowingly permit any of the said tools or utensils prohibited to be exported, to be put on board his ship, &c. he shall forfeit one hundred pounds, to be sued for and recovered as the penalties of this act inflicted upon persons exporting the said tools or utensils, and if such vessel, &c. belongs to his Majesty, the captain or master thereof shall forfeit one hundred pounds and his employment, and be incapable of any office under the crown. *f. 5.*

6. If any officer of the customs in *Great Britain*, or of the revenue in *Ireland*, shall take an entry outward, or shall sign any sufferance for the shipping or exporting of any of the said tools, or shall knowingly permit the same to be done, directly or indirectly, he shall forfeit one hundred pounds and his office, and be incapable of any office under the crown. *f. 6.*

7. One moiety of the respective forfeitures inflicted upon offenders against this act, to go to the king, and the other to the prosecutor, *f. 7.*

8. All suits which shall be brought against any person for what he shall do in pursuance of this act, shall be commenced within six months after the fact, and the defendant may file common bail, or enter a common appearance, and plead the general issue, and if the plaintiff shall become nonsuit or suffer discontinuance, or if a verdict or judgment upon demurrer be given against him, the defendant shall recover treble costs.

9. By the 8 G. 1. c. 9. *f. 11.* If any subject of his Majesty shall within this kingdom list or enter himself, or if any person shall enlist or shall procure or prevail on any person being a subject of his Majesty to list and enter himself, or to go beyond the seas, or embark in order to be listed to serve any foreign prince, state, or person as a soldier, without licence of his Majesty under the sign manual, or of the chief governors of this kingdom under their hands first obtained for listing any of the subjects of his Majesty to serve any such foreign prince, &c. or person as soldiers, every person so offending being thereof convicted shall be adjudged guilty of felony without benefit of clergy or of the statute, 9 Ann. c. 6.

10. All persons who shall harbour, conceal, or entertain any such offenders, knowing them to be guilty of such offence, shall be adjudged guilty of felony without benefit of clergy or of the said statute. *f. 12.* Harbouring offenders.

The preceding clauses are continued, by Stat. 29 G. 2. c. 8. f. 2. for twenty one years, &c. from the end of that session.

11. And by the 11 Geo. 2. cap. 7. sect. 1. If any subject of his Majesty, shall, within this kingdom, enlist or enter himself, or shall go beyond the seas and enlist, or with an intent to enlist or enter himself as a non-commissioned officer or private soldier in the service of any foreign prince, state, or potentate, or if any person shall, within this kingdom, enlist or persuade, entice or procure any subject of his Majesty to enlist or enter himself, or shall hire or retain any subject of his Majesty, with an intent to cause such person to be enlisted, or to enter himself, or persuade or procure any subject of his Majesty to go beyond the seas, or embark with an intent to be enlisted or to enter himself as a non-commissioned officer or private soldier in any foreign service, without the licence of his Majesty under the sign manual, or of the chief governors of this kingdom under their hands and seals, or if any person or persons shall carry away by force out of this kingdom any subject of his Majesty, with an intent to persuade or compel such person to enlist or enter himself as a non-commissioned officer or private soldier in the service of any foreign prince, &c. persons so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, without benefit of clergy, or of the statute 9 Ann. cap. 6. Enlisting to go beyond the seas.

12. Every person who shall harbour, conceal, relieve, entertain, or transport beyond the seas any such offender, or shall be aiding or assisting therein, knowing him to be guilty of such offences or any of them, being thereof convicted, shall be adjudged guilty of felony, without the benefit of clergy, or of the said statute, and may be tried, although the principal offender be not convicted or outlawed for the said felony. *f. 2.* Carrying away by force.

13. No papist or reputed papist shall be capable of serving as a juror upon the trial of any of the said offenders, and it shall be lawful for such persons who shall prosecute in behalf of his majesty, to challenge any papist or reputed papist, and assign for cause that the person so returned to serve as a juror, is a papist or reputed papist, which shall be a principal challenge, and the judges before whom the said offenders shall be tried, shall allow the same to be a legal challenge. *f. 3.* Aiding and assisting felony.

14. Where any offence against this act shall be committed out of this kingdom, the same may be alledged to be committed, and may be laid and tried in any county in Ireland. *f. 4.* Papists not to be jurors, &c.

15. In case any person so enlisted or inveigled to go beyond the seas, in order to be enlisted as a non-commissioned officer or private soldier, in any foreign service, without licence first had as aforesaid, shall, within fourteen days after such enlisting or agreement to go beyond the seas, in order to be enlisted, or in case any person so carried away by force out of this kingdom, to the intent to be enlisted, or that shall be compelled to enlist or serve any foreign prince, &c. as aforesaid, shall within two months after their return to this kingdom, voluntarily discover, upon oath before any justice of the peace, the persons by whom he was so enlisted or inveigled or carried away. Offences out of the kingdom.

Indemnity to discoverers.

Foreign Service

way by force, so as they may be apprehended and convicted of the said offence, such persons so discovering, shall be indemnified from all penalties on account of the said offence. *f. 5.*

Proclamation
upon present-
ments.

16. Moreover by the 25 *Geo. 2. cap. 12.* If any persons shall hereafter be presented by the grand jury at any assizes or general quarter-sessions of the peace, for having enlisted or used any means to seduce or prevail upon any person to enlist as a soldier or non-commissioned officer in any foreign service, without licence of his Majesty, under the sign manual, or of the chief governors of this kingdom, under their hands first obtained, and such presentment being returned to the clerk of the council, the persons in such presentments named, shall by proclamation from the lord lieutenant or other chief governors and council be proclaimed. *f. 1.*

Not surrender-
ing, high trea-
son.

17. And in case the persons so presented and proclaimed, for having enlisted or used any means to seduce or prevail on any person to enlist as a soldier or non-commissioned officer in any foreign service, without a licence, do not within the time limited by such proclamation, render themselves to some of the justices of the peace of the county, where such presentment shall be made, they shall be from thenceforth convict of high treason, and suffer accordingly: and all persons knowingly concealing, aiding, abetting, or succouring such persons so presented and proclaimed, after the time limited by such proclamation, shall be guilty of felony, without benefit of the clergy, or of the statute.

Printed pro-
clamation, evi-
dence.

18. The printed proclamation, wherein such persons are named to be presented by the grand jury of any county at the general assizes or quarter-sessions, to be guilty of the offence aforesaid, shall be adjudged sufficient evidence. *f. 2.*

Examination to
be taken, &c.

19. Provided, that before any grand jury shall present any persons as aforesaid, examination shall be taken before some judge of the court of king's bench, judge of assize, or justice of the peace upon oath, which examination shall be lodged with the clerk of the crown or peace for the county or place where such persons shall be presented, and a copy thereof shall be certified, together with the presentment, to the chief governors and council before the persons so presented shall be proclaimed. *f. 3.*

This act is continued by Stat. 3 Geo. 3. cap. 20. sect. 2. for seven years, from the first day of June, 1764, and to the end of the then next session of parliament.

Landing in this
kingdom, &c.

20. Also, by the 29 *Geo. 2. cap. 5.* Every person, being a natural born subject of this kingdom, who now is, or hereafter shall be, an officer, soldier, or mariner, in the service of the *French* king, who shall land, or attempt to land, or shall be found in *Ireland*, or shall be found on board any ship, vessel, or boat, being so on board with intent to land in this kingdom; and every person who shall within this kingdom knowingly aid, abet, conceal, comfort, or succour any such officer, soldier, or mariner, returning into this kingdom, shall stand and be adjudged guilty of felony, without benefit of the clergy, and shall suffer and forfeit as persons attainted of felony. *f. 1.*

21. Any

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21. Any offence against this act may be tried, and the venue laid in any county in this kingdom. *§. 2.* Venue in any county.

22. If any officer, soldier, or mariner, now actually engaged in the service of the *French* king, shall, on or before the first day of *August*, 1756, return into this kingdom, with intent to become a dutiful and faithful subject to his Majesty, &c. and surrender himself to any justice of the peace in this kingdom, such officer, soldier, or mariner, shall be committed to the common gaol of any county, city, or town, until the next general assizes, or general quarter-sessions of the peace; unless such officer, soldier, or mariner, can, with good and sufficient sureties, enter into a recognizance, in the usual manner, to appear at such general assizes, or quarter-sessions of the peace. Persons returning to this kingdom.

23. And if such officer, soldier, or mariner, so returning into this kingdom, shall, at the said next general assizes or quarter-sessions, take and subscribe the oaths of allegiance and abjuration, in open court, such officer, soldier, or mariner, shall from thenceforth be freed from all offences, penalties, and forfeitures, created by this act, or by any former law in this kingdom against inlisting in foreign service. *§. 3.* And taking the oaths, &c.

24. Provided, that the return of such officer, soldier, or mariner, into this kingdom, within the time herein before limited, and their compliance with the terms prescribed by this act, shall not extend to restore or intitle any such officer, soldier, or mariner, to any lands, &c. or any money, chattels, debts, or securities for money, or real or personal estate, or trust estate, or interest in the same, already recovered by any protestant discoverer, or for recovery of which any suit was instituted by any protestant discoverer, by virtue of *Stat. 19 Geo. 2. cap. 7.* but such recovery and suit shall remain in such plight, as if this act had never been made. *§. 4.* Not to restore to estates, &c. already recovered.

Forestalling, ingrossing, and regrating.

Forestalling (*forestellan*, or *forestallan*) in the English Saxon signifieth properly to *market before the publick*, or to *prevent the publick market*; and metaphorically, to *intercept* in general: and seemeth derived from *fore*, which is the same as *before*, and *stalle* a standing place or department; from whence sprang the ancient word *stallage*, which signifieth money paid for erecting a stall or stand, for the selling of goods in a fair or market:

Ingrossing is from *in*, and *gross*, great or whole:

And *regrating*, from *re*, again, and the French *grater*, to *grate* or *scrape*; and signifieth the scraping or dressing of cloth or other goods, in order for selling the same again.

I shall treat, first, concerning these offences at the common law; and, secondly, concerning the same by statute.

I. Concerning these offences at common law.

1. At the common law, all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again

Forestalling, ingrossing, &c.

again the same thing in the same market, or by any other such likes devices, are highly criminal, and punishable by fine and imprisonment. 8 *Haw.* 234, 5.

2. By the common law, a merchant bringing victuals into the realm, may sell the same in gross; but no person can lawfully buy within the realm any merchandize in gross, and sell the same in gross again, without being liable to be indicted for the same. 3 *Inst.* 196.

3. And the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at common law, whether any part thereof be sold by the ingrosser or not. 1 *Haw.* 235.

4. And so jealous is the common law of all practices of this kind, that it will not suffer corn to be sold in the sheaf; perhaps for this reason, because by such means the market is in effect forestalled. 1 *Haw.* 235.

5. Anciently the ingrosser and regrater were comprehended under the word forestaller; but now they are distinguished by the statute 5 & 6 *Edw.* 6. cap. 14. *Eng.* which is either declaratory of the common law, or of the ancient statutes (which by *Poyning's* act were introduced as laws of *Ireland*) by this act.

Forestalling,
what.

1. *Whosoever shall buy, or cause to be bought, any merchandize, victual, or any other thing whatsoever, coming by land or by water toward any market or fair, to be sold in the same, or coming toward any city, port, haven, creek, or road, from any parts beyond the sea to be sold; or make any bargain, contract or promise, for the having or buying the same, or any part thereof so coming as is aforesaid, before the said merchandize, victuals, or other things shall be in the market, fair, city, port, haven, creek, or road, ready to be sold; or shall make any motion by word, letter, message, or otherwise, to any person for the enhancing of the price, or dearer selling of any thing above-mentioned; or else dissuade, move, or stir any person coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed, to any market, fair, city, port, haven, creek, or road, to be sold, as aforesaid,——shall be deemed a forestaller.* En. ft. 5 Ed. 6. c. 14. f. 1.

Ingrossing,
what.

2. *Whosoever shall ingross, or get into his hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land or tythe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, shall be deemed an unlawful ingrosser.* f. 3.

Regrating,
what.

3. *Whosoever shall by any means regrate, obtain, or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market to be sold, and do sell the same again in any fair or market bolden or kept in the same place, or in any other fair or market within four miles thereof, shall be deemed a regrater.* f. 2.

II. Concerning these offences by statute.

1. *Ordinance for bakers, &c. intertemporis, cap. 10.* No forestaller shall be suffered to dwell in any town, who manifestly is an oppressor of the poor, a publick enemy of the country, who meeting grain, fish, herring, or other things

things coming to be sold, doth make haste to buy them before others, thirsting after wicked gain, oppressing the poor, and deceiving the rich, and by that means goeth about to sell the said things much dearer than he which brought them; who cometh about merchant strangers and offereth them his help in the sale of their wares, and informeth them, that they may sell their wares dearer than they meant to have done; he that is convict thereof the first time, shall be amerced, and shall lose the thing so bought, according to the custom of the town; he that is convict the second time, shall have judgment of the pillory; the third time, he shall be imprisoned and ransomed; the fourth time, he shall abjure the town; and likewise they that give them counsel, help, or favour.

2. *Eng. stat. 25 Edw. 3. stat. 4. cap. 3.* The forestallers of wines and other victuals and merchandises that come by land or by water, if they be thereof attainted at the suit of the king or the party, before mayor, bailiff, or justices thereto assigned, or elsewhere in the king's court, and if they be attainted at the king's suit, the things forestalled shall be forfeit to the king, if the buyer hath made gree to the seller. And if he hath not made gree of all but by earnest, the buyer shall incur the forfeiture of as much as the forestalled goods amount to; and if they have not whereof, then he shall have two years imprisonment, and more, at the king's will. And if he be attainted at the suit of the party, the party shall have one half of such forfeit, or the price of the king's gift, and the king the other half.

Confirmed by Eng. stat. 2 Ric. 2. stat. 1. cap. 2.

3. *8 Edw. 4. cap. 2.* No man (having sufficient store of corn of his own) shall buy any in the common market; nor shall any called Badgers, buy corn at one market, and shortly after carry the same to another market, and sell the same dearer there, upon such pain as is made against regrators of the king's market.

And none shall buy any corn in the common market, to sell the same again in the same market, nor in any other market, upon pain to be adjudged in law a common regrator.

4. It is said not to be sufficient in an indictment or information, to say that the defendant bought so much goods, but the words of the statute are to be pursued, which are——*shall engross or get into his hands by buying.* But it is not necessary to set forth, that the defendant did not come by it, by a demise of land, or the like; but the defendant, if he have any such matter to alledge, must give it in evidence. *1 Haw. 237, 238.*

5. From the general rules of law, that no information for any of the said offences can be good, without shewing in certain the quantity of the thing for which the penalty is supposed to be incurred, not only because otherwise the judgment to be given on such an information can never be pleaded in bar of any other, because it cannot appear that both of them were brought for the same thing; but also, because it cannot appear to the court what forfeiture the defendant ought to incur, unless the extent of the offence be specially set forth. *1 Haw. 238.*

Also, it hath been resolved, that such *victual* only, as is necessary for the food of man, is within the statute of *5 & 6 Ed. 6.* and therefore that apples

Forestalling, ingrossing, &c.

and cherries, and such like fruit are not: but that salt is a victual within the meaning of it. 1 Haw. 238.

A. Indictment for forestalling.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of the parish of——— in the county aforesaid, yeoman, on the——— day of——— in the——— year of the reign of——— at the parish aforesaid, in the county aforesaid, did buy and cause to be bought of and from one A. S. twenty oxen, for the sum of 200*l.* of lawful money of Great Britain, as he the said A. S. then and there was driving the said twenty oxen towards the market of M. to sell the said twenty oxen in the said market, and before the said twenty oxen were brought into the said market, where the same should be sold; in contempt of our said lord the king and his laws; to the evil example of all others in the like case offending against the peace of our said lord the king, his crown and dignity, and against the form of the statute in that case made and provided.

B. Indictment for ingrossing.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of——— in the county aforesaid, yeoman, on the——— day of——— in the——— year of the reign of——— at——— aforesaid, in the county aforesaid, did ingross and get into his hands, by buying of and from one A. S. 50 quarters of wheat, to the intent to sell the same again; to the evil example of all others in the like case offending against the peace of our said lord the king, his crown and dignity, and against the form of the statute in that case made and provided.

C. Indictment for regrating.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of the parish of——— in the county aforesaid, yeoman, on the——— day of——— in the——— year of the reign of——— at the parish aforesaid, in the county aforesaid, to wit, in a certain market then and there holden, did buy, obtain, and get into his hands and possession ten geese and twenty chickens, of and from one A. S. for the sum of 30*s.* of lawful money of Great Britain (the said geese and chickens then being brought to the said market by the said A. S. to be sold) and that afterwards, to wit, on the same——— day of——— in the year aforesaid, he the said A. O. at the parish aforesaid, in the county aforesaid, in the said market there, unlawfully did regrate the said geese and chickens, and sell the same again to one A. B. for the sum of 40*s.* of like lawful money of Great Britain, in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, against the peace of our said lord the king, and against the form of the statute in that case made and provided.

The forfeitures for particular offences may be found under their respective titles ; here it is treated of forfeitures in general.

I. Of forfeiture of lands and goods.

II. Of loss of dower.

III. Of corruption of blood.

I. Of forfeiture of lands and goods.

1. **I**T seems agreed, that by the common law, all lands of inheritance, ^{Forfeiture of} whereof the offender was seised in his own right, and also all rights of ^{lands.} entry to lands in the hands of a wrong doer, are forfeited to the king, by an attainder of high treason, and to the lord of whom they are immediately holden, by an attainder of petit treason or felony. 2 *Haw.* 448.

But it seems clear, that the lord cannot enter into the lands holden of him, upon an escheat for petit treason or felony, without a special grant, till it appear by due process, that the king hath had his prerogative of the year, day, and waste. 2 *Haw.* 448.

Concerning which year, day, and waste, it is enacted by the 17 *Ed.* 2. c. 16. that the king shall have the goods of all felons attainted, and fugitives, wheresoever they be found. And if they have freehold, it shall be forthwith taken into the king's hands, and the king shall have all profits of the same by one year and one day ; and the land shall be wasted and destroyed in the houses, woods, and gardens, and in all manner of things, belonging to the same land. And after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee, unless that he fine before with the king, for the year, day, and waste.

2. As to forfeiture of goods, it seems agreed, that all things whatsoever, ^{Forfeiture of} which are comprehended under the notion of a personal estate, whether they ^{goods.} be in action or possession, which the party hath or is intitled to, in his own right, and not as executor or administrator to another, are liable to such forfeiture, in the following cases :

(1) Upon a conviction of treason or felony. 2 *Haw.* 450.

(2) Upon a flight found before the coroner, upon view of a dead body. *id.*

(3) Upon an acquittal of a capital felony, if the party is found to have fled. *id.*

(4) Also, a person indicted of petit larceny, and acquitted, yet if it be found he fled for it, forfeits his goods, as in case of grand larceny. 1 *H.* 530. 2 *Haw.* 451.

But it is certain that the party may in all cases, except that of the coroner's inquest, traverse the finding of the flight. Also it seems agreed, that the particulars of the goods found to be forfeited may be also traversed. 2 *Haw.* 451.

Forfeiture.

(5) Upon a presentment by the oaths of 12 men, that a person arrested for treason or felony, fled from, or resisted those who had him in custody, and was killed by them in the pursuit or scuffle. 2 *Haw.* 451.

(6) By being waived or left by a felon in his flight, whereby he forfeits the goods so waived, whether they be his own, or the goods of others stolen by him, which shall not be restored to the right owners but upon a proper prosecution. 2 *Haw.* 451.

(7) Also, a convict within clergy, forfeits all his goods, tho' he be burnt in the hand; yet thereby he becomes capable of purchasing other goods. 2. *H. H.* 388, 389.

But on burning in the hand, he ought to be immediately restored to possession of his lands. 2. *H. H.* 389.

Forfeiture upon outlawry.

3. Upon outlawry in treason or felony, the offender shall loose and forfeit as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force *Wood. b. 4. c. 5.*

And those that tarry till the exigent, in treason, felony, or petit larceny, forfeit their goods, tho' they render themselves to justice, and are acquitted; for it was a flight in law. *Wood. b. 4. c. 5.*

Forfeiture in se defendendo.

But where the killing a man in his own defence is in the law no felony, there is no forfeiture, unless he fled; for that is a distinct forfeiture, altho' the party be not guilty of the fact. 1 *H. H.* 493.

To what time the forfeiture shall relate.

5. It seems agreed, that the forfeiture, upon an attainder either of treason or felony, shall have relation to the time of the offence, for the avoiding of all subsequent alienations of the *lands*; but to the time of the conviction or flight found only, as to *chattels*; unless the party were killed in flying or resisting, in which case it is said, that the forfeiture of the chattels shall relate to the time of the offence. 2 *Haw.* 454.

What is to be done with the felons goods before forfeiture.

6. But tho' the goods of an offender be not forfeited, till the conviction, or flight found by inquest, yet whether they may be seized upon the offence committed, hath been controverted; concerning which lord *Hale* saith thus:

It seemeth clear, that at the common law, if a man had committed felony or treason, or tho' possibly he had committed none, yet if he had been indicted, the sheriff, coroner, or other officer, could not seize and carry away the goods of the offender or party accused.

Again, he could not in that case have removed the goods out of the custody of the offender or party accused, and deliver them over to the constables, or to the *villata*, to answer for them:

But if the party were indicted, the sheriff or other officer might make a simple seizure of them only to inventory and appraise them, and leave them to the custody of the servants or bailiff of the party indicted, in case he would give security against their being embezzled, or in default thereof he might deliver them to the constable or vill to be answerable for them, but yet so that the party accused and his family have sufficient out of them for their livelihood and maintenance:

And possibly the same law was, tho' he were not indicted, but *de facto* had committed a felony, but with this difference, if he had been indicted, this kind of seizure might have been made, whether he committed the felony or not:

But

But in this case if there were no indictment, then it is at the peril of him that seizeth, if he committed not the felony :

And then as to the statute of 1 R. 3. c. 3. it is as follows ; *No sberiff or other person shall take or seize the goods of any person arrested or imprisoned for suspicion of felony, before he be convicted or attainted, or before the goods be otherwise forfeited ; on pain of double value to the party grieved :*

Mr. Stamford thinks this is but in affirmance of the common law, only that it gives a penalty : but it seems to be somewhat more than so, for this prohibits the seizure of the goods of a party imprisoned, tho' he were also indicted, but not yet convicted, where unquestionably the common law allowed such a seizure, if the party or his friends did not secure the forth coming of the goods, where the party was indicted :

But upon this statute these things are considerable ; 1. As to persons at large, it seems to me (says he) that if they fly not, there can be no seizure at all made, whether they are indicted or not ; for the statute did not intend a greater privilege to a party imprisoned, than to him that is at large. 2. That if he be at large and fly for it, yet his goods cannot be seized and removed, whether he be indicted or not indicted. 3. That if he be indicted, and at large yet the goods cannot be removed, but only viewed, appraised and inventoried, in the house or place where they lie :

And yet I know not how it comes to pass, says he, the use of seizing the goods of persons accused of felony, tho' imprisoned or not imprisoned, hath so far obtained notwithstanding this statute, that it passeth for law and common practice, as well by constables, sheriffs, and other the king's officers, as by lords of franchises, that there is nothing more usual :

Upon the whole, he says, that the opinion of my lord Coke, in his 3 Inst. 228. hath truly stated the law, at least as it stands upon the statute of 1 R. 3. viz. 1. That *before* the indictment, the goods of any person cannot be searched, inventoried, or in any sort seized. 2. That *after* the indictment, they cannot be seized and removed, or taken away, before conviction or attainder :

But then it may be said, to what purpose may they be searched and inventoried after indictment, if they may not be removed, but are equally liable to embezzling as before :

I think (he says) he is not bound to find sureties, neither hath the officer at this day any power to remove them in default of sureties, and commit them to the vill, but only to inventory them, and leave them where he found them (unless in case of a second *capias* on the 25 Ed. 3. c. 14.) for the prisoner or party indicted may sell them *bona fide* ; and if he may do so, the vendee may take them, and the *villata* cannot refuse the delivering of them to the vendee, tho' the goods had been delivered to them :

But there is this advantage by the viewing and appraising, that thereby the king is ascertained what the goods are, and may pursue them that take or embezel them, by information (if the party happen to be convicted) and try the property with them, whether they are really sold, or sold only fraudulently without valuable consideration, to prevent the forfeiture. 1 H. H. 363, 4, 5, 6, 7.

Forfeiture.

II. Of loss of dower.

Forfeiture of
dower in felony.
In treason.

1. Albeit a person shall be attainted of felony, yet his wife shall not forfeit her dower. 1 *Ed. 6. c. 12. f. 17.*
2. But on his attainder of any treason, she shall forfeit her dower. 5 & 6 *Ed. 6. c. 11. f. 13.* But in some kinds of treason (particularly with regard to the coin) there is a special saving of the wife's dower by statute.

III. Of corruption of blood.

Corruption of
blood.

1. It is agreed, that by an attainder of treason or felony, the blood is so far stained or corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble. 2 *Haw. 456.*
2. Also, that he can neither inherit as heir to an ancestor, nor have an heir. 2 *Haw. 456.*
3. But the king's pardon, tho' it doth not restore the blood, yet as to issues born after, hath the effect of a restitution. 1 *H. H. 358.*
4. But restitution of blood in its true nature and extent, can only be by act of parliament. 1 *H. H. 358.* 2 *Haw. 458.*

Forgery.

1. **F**ORGERY is an offence at common law, and an offence also by statute.

2. Forgery at the common law, is an offence in falsely and fraudulently making or altering any manner of record, or any other authentick matter of a publick nature; as a parish register, or any deed, will, privy seal, certificate of holy orders, protection of a parliament man, and the like 1 *Haw. 182, 184.*

As for writings of an inferior nature, as private letters, and such like, the counterfeiting of them is not properly forgery; therefore in some cases it may be more safe to prosecute such offenders for a misdemeanor, or cheats. For by reason of the uncertainty of opinions, concerning proper forgeries at common law, indictments are generally brought upon some of the following statutes, and very few at common law. But if the indictment is at common law, and the offender is convicted, he may be pillored, fined, and imprisoned. *Wood. b. 3. 1-Haw. 184.*

But as to the power of justices of the peace in this matter, Mr. *Hawkins* says, it hath been settled of late, that they have no jurisdiction over forgery at the common law; the principal reason of which resolution (he says) as he apprehended, was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence, and the word *trespass* in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only in the commission, or at the most to extend to such other offences only

only as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like, which on this account have been adjudged indictable before justices of the peace. 2 Haw. 40. 1 Salk 406.

But Mr. Barlow says nevertheless, that it seemeth clear, that a justice of the peace may take an information thereof, bind over the informers, examine the offender, certify his examination to the proper judges, and commit him to prison in order to abide his trial. Barl. 244.

3. The statutes that make forgery an offence are these that follow :

The first is the act, 28 Eliz. c. 3. by which if any person upon his own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause, or willingly assent to be forged or made ; any false deed, charter, or writing sealed, court roll, or the will of any person in writing, to the intent that the estate of freehold or inheritance of any person, of any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest of any person in the same may be molested, troubled, defeated, recovered, or charged ; or shall pronounce, publish, or shew forth in evidence the same as true, knowing the same to be false or forged, to the intent as above (except lawyers or attornies for their clients, not being privy to the forgery) ; and shall be thereof convicted, either upon action at the suit of the party, or otherwise according to the order and due course of the laws of this realm, — he shall pay to the party double costs and damages, and be set in the pillory, and have both his ears cut off, and his nostrils slit and seared with a hot iron, and shall forfeit the profits of his lands during life, and be imprisoned also during life. s. 2.

And all justices of oyer and terminer, and justices of assize, shall have power to inquire of, hear, and determine all offences in this act. s. 10.

Upon his own head] When the proceedings were in latin, *super proprium suum caput* was allowed to be good upon an indictment on this statute ; the law having more regard that the statute be strictly pursued, than rendered into proper latin. 1 Haw. 187.

Forge or make] Making a second deed, and antedating it, with intent to make it take place of a former deed, is forgery within this statute. 3 Inst. 167.

Or subtilly cause, or willingly assent] To *cause*, is to procure or counsel one to forge ; to *assent* is to give his assent or agreement afterwards, to the procurement or counsel of another ; to *consent*, is to agree at the time of the procurement or counsel, and such is in law a procurer. 3 Inst. 169.

But lord Hale says, that an assent after the fact is committed, makes not the party assenting guilty or principal in the forging ; but it must be a precedent, or concomitant assent. 1 H. H. 684.

False deed, charter, or writing] It seems to be no way material, whether a forged instrument be made in such a manner, that if it were in truth such as it is counterfeited for, it would be of validity or not ; and upon this ground it hath been adjudged, that the forgery of a protection in the name of a member of parliament, who in truth at the time was not a member, is as much a crime as if he were. 1 Haw. 184.

Writing

Writing sealed] These are large words; and the making of a false customary of a manor in writing under seal, containing divers false customs, to the disherison of the lord of the manor, and that the same had been allowed and permitted by the lord of the manor, which was also false, was resolved to be within these words, *a false writing sealed*. 3 Inst. 171.

Sealed] It is required that the deed, charter, or writing must be sealed, that is, have some impression upon the wax; for wax, without an impression, is not a seal. 3 Inst. 169.

Court roll, or will] Here are two writings which need not be sealed, because they may take effect without any seal, for that they be no deeds; and no writing can have the force of a deed without a seal. 3 Inst. 170.

Will] If any person which writeth the will of a sick man, inserteth a clause therein concerning the devise of lands, without any direction of the deviser, this is forgery, altho' he did not forge the whole will. 3 Inst. 170.

To the intent that the state of freehold or inheritance of any person, of any lands, tenements, or hereditaments, freehold, or copyhold, or the right, title, or interest of any person in the same may be molested, troubled, defeated, recovered, or charged] E. 4 G. 2. K. and Japhet Crooke. The defendant was convicted on this statute for forging a lease and release. And the indictment sets forth, that Garbut and his wife were seised in fee of certain messuages, lands, and tenements called Jawick in the parish of Clackton in Essex, and that the defendant intending to molest them and their interest in the premises, forged a lease and release as from Garbut, and his wife, whereby they are supposed for a valuable consideration to convey to him "all that park called Jawick park in the parish of Clackton in Essex, containing eight miles in circumference, with all the deer, woods, &c. thereto belonging." It was moved in arrest of judgment, that the premises supposed to be conveyed, were so materially different from those which were really the estate of Garbut and his wife, which was houses, lands, and tenements; that it was impossible this conveyance ever could molest or disturb them: if it was a true deed, it could not pass their lands at law, for want of a proper description; and though where lands are improperly described, a court of equity will oblige the vendor to convey them by proper words, yet that is only where there is a previous contract for a sale, and they do it as carrying that contract into execution. The court for several terms inclined strongly with the objection; but this term Raymond Ch. J. declared that they were all of opinion to over-rule it: for by the words of the act, it is not necessary that there should be a charge or a possibility of a charge; it is sufficient that it be done with that intent, and the jury have found that it was done with intent to molest Garbut and his wife in the possession of their lands. Accordingly judgment was given for the king, and the defendant had sentence to undergo the punishment appointed by the act for forging a deed, and the same was executed upon him at Charing-cross. Str. 901.

Pronounce or publish] That is, when one by words or writing, pronounceth or publisheth the deed to any other as true. 3 *Inst.* 171.

Knowing the same to be forged] This knowledge may come by two means, either of his own knowledge, or of the relation of another; for if another tell him it is forged, and he publish it afterwards as true, and it prove to be forged indeed, he is in danger of this statute. 3 *Inst.* 171. 1 *Haw.* 187.

But lord *Hale* says, that tho' such a relation may be an evidence of fact to prove his knowledge, yet it is not conclusive; for perchance there might be circumstances of fact, that might make the person relating it, or his relation, not credible: So that the *knowing* must be upon the whole matter left to the jury, upon the circumstances of the case. 1 *H. H.* 685.

Justices of oyer and terminer] Albeit justices of the peace, by their commission, have power to hear and determine felonies and trespasses, yet they are not included under the name of justices of oyer and terminer; for justices of oyer and terminer are known by one distinct name, and justices of the peace by another. 3 *Inst.* 103.

And by the same statute it is further enacted, that if any person, upon his own head or imagination, or by false conspiracy or fraud with any other, shall wittingly, subtilly, and falsely forge or make, or cause or assent to be made and forged any false charter, deed or writing, to the intent that any person may have or claim any estate or interest for term of years in any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity in fee-simple, fee-tail, or for term of life, lives, or years; or any obligation, or bill obligatory, or any acquittance, release, or other discharge of any debt, account, action, suit, demand, or other thing personal; or shall pronounce, publish, or give the same in evidence as true, knowing the same to be false and forged; he shall, on conviction in like manner, pay to the party double costs and damages, and be set on the pillory, and have one of his ears cut off, and be imprisoned for a year. s. 3.

Obligation or bill obligatory] The forgery of a deed of gift of mere personal chattels, is not within this statute. 1 *Haw.* 186.

And if after verdict, the plaintiff shall release the judgment or execution, or suffer a discontinuance, it shall only discharge his own costs and damages, and not the other punishments. s. 6.

And by the same statute it is further enacted, that if any person shall after conviction offend again in any of the ways above-mentioned, he shall be guilty of felony without benefit of clergy. s. 7, 8.

4. Thus stood the matter upon the act of 28 *Eliz.* Afterwards by many subsequent statutes (several of which were occasional only, and adapted to the particular juncture and circumstances of the time in which they were made, but which are referred to and enforced by the subsequent statutes on the same subject) divers other forgeries were made felony without benefit of clergy for the first offence; and others had other punishments assigned them.

Forgery.

3 Geo. 2. cap. 4. sect. 1. If any person shall forge or counterfeit, or procure to be forged or counterfeited, or willingly assist in the forging or counterfeiting, any deed, last will or testament, bond, writing obligatory, bill of exchange, promissory note for payment of money to the value of five pounds, indorsement or assignment of any bill of exchange, or such promissory note for payment of money, or any acquittance or receipt either for money or goods to the value of five pounds, with intention to defraud any person, or shall utter or publish as true any forged or counterfeited deed, last will or testament, bond, writing obligatory, bill of exchange, such promissory note for payment of money, indorsement or assignment of any bill of exchange, or such promissory note for payment of money, such acquittance or receipt either for money or goods, with intention to defraud any person, knowing the same to be forged or counterfeited; every such person being thereof convicted, shall be deemed guilty of felony, and shall either be admitted to the benefit of clergy or of the statute, and be burned in the hand, or shall be transported as other felons at the discretion of the court, before which such offender shall be convicted. *Brit. Stat. 2 Geo. 2. cap. 25.*

This act is continued by Stat. 29 Geo. 2. cap. 9. sect. 9. for twenty one years after the 25th of March, 1757, and to the end of the then next session of parliament. It is also continued by the same act, sect. 2. for twenty-one years from the end of that session of parliament, and to the end of the then next session.

17 Geo. 2. cap. 11. sect. 1. If any persons shall upon the act 3 Geo. 2. cap. 4. be indicted for felony, for falsely making, forging, or counterfeiting, or causing or procuring to be falsely made, forged, or counterfeited, or willingly acting or assisting in the false making, forging, or counterfeiting, any deed, last will or testament, bond, writing obligatory, bill of exchange, or promissory note for the payment of money to the value of five pounds, indorsement or assignment of any bill of exchange or of such note, or any acquittance or receipt, either for money or goods, to the value of five pounds, with intention to defraud any person, and thereof be convicted or attainted, they shall be excluded from the benefit of clergy, or of the statute.

This act, so far as the same relates to the taking away the benefit of clergy in cases relating to forgery, is continued by Stat. 29 Geo. 2. cap. 8. sect. 9. for twenty-one years from the 25th of March, 1758, and to the end of the then next session of parliament.

6. And by the *Brit. Stat. 7 Geo. 2. cap. 22.* It is further enacted, by way of addition to the foregoing, that if any person shall falsely make, alter, forge, or counterfeit, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money or delivery of goods, with intent to defraud any person; or shall utter or publish the same as true, with intent to defraud any person, knowing the same to be false;—he shall be guilty of felony without benefit of clergy: and this without any saving of the corruption of blood, or disinheritance of heirs.

Warrant

Warrant or order for payment of money or delivery of goods] In the case of *Mary Mitchell*, on this order,

Oct. 16. 1753.

“ Mr. Jefferys,
 “ I desire you to let this woman have six yards of ordinary stuff, one pair
 “ of stockings, one shift, one apron, one handkerchief, and I will see it all
 “ paid for. Witness my hand, *George May*.”

Upon a conference among the judges, nine of them were of opinion, that this writing is not a warrant or order for the delivery of goods within the meaning of the act: That the words *warrant or order* do import, that the person giving such warrant or order hath or at least claimeth an interest in the money or goods which are the subject matter of that warrant or order; that he hath or at least assumeth a disposing power over such money or goods; and taketh on him to transfer the property, or custody of them at least, to the person in whose favour such warrant or order is made: And tho' the present case, and many others of the like kind, may come within the mischiefs intended to be prevented by the act, yet in the construction of acts so penal as this, the old rule of adhering strictly to the letter must not be departed from. And the prisoner was discharged from the indictment which was brought against her for forging of this order. *Fost. 119.*

Game.

THE statutes relating to this title are very numerous, and the sense sometimes a little perplexed, so that perhaps upon a view of the whole, it may seem, that about four or five new acts, comprehending the several heads here under-mentioned, and repealing all the preceding ones, would conduce to render this branch of our laws more intelligible and useful.

After having first premised (in order to avoid frequent repetitions throughout this whole title) that where it is enacted by some particular statutes, that where any person for any offence against any law in being at the making of such acts for the better preservation of the game, shall be liable to pay any pecuniary penalty or sum of money, on conviction before a justice of the peace, the prosecutor may either proceed to recover the same in such manner, or he may sue for the same (within such time as is limited by such statute) by action of debt, or on the case, bill, plaint, or information, in any court of record, wherein if he recovers he shall have double costs. And, in some cases, where a moiety of the said penalty by several acts is directed to be applied to the use of the poor of the parish where the offence was committed, by reason whereof inhabitants of the said parish have been disallowed to give evidence; it is enacted, that it shall be lawful for any person to sue for the whole of such penalty to his own use, and if he recovers he shall have double costs; such action to be brought within the time limited after the offence committed: (This being premised) I will treat of this subject under the following heads:

- I. Origin of the distinct property in game.
- II. Certain observations concerning forests, chases, parks, and warrens.
- III. Concerning gamekeepers.
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- V. Laws for preserving the four footed game in particular.
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- VII. Laws for preserving the game of fish in particular.

Under which three last heads are comprehended those restrictions which seem to concern all persons whatsoever, whether qualified or not; for altho' a man be qualified to kill game, yet he must kill it in a lawful manner, and not in such ways as tend utterly to destroy it.

I. Origin of the distinct property in game.

Before we take notice of the statutes made for the preservation of the game, it may be requisite to observe how the common law stood herein; which depends upon the difference made between tame and wild animals.

The tame animals, such as horses, cows, sheep, and the like, are such creatures, as by reason of their sluggishness and unaptness for motion, do not fly the dominion of mankind, but generally keep within the same pastures and limits, and may be easily pursued and overtaken, if by accident they should escape; and therefore the owner hath the same kind of property in them, as he hath in all other inanimate chattels, and for the violation thereof may bring an action of trespass.

The wild animals, such as deer, hares, foxes, and such like, are those, which by reason of their swiftness or fierceness fly the dominion of man; and in these, no person can have a property, unless they be tamed or reclaimed by him. And as property is the power that a man hath over any other thing for his own use, and the ability that he hath to apply it to the sustentation of his being; when that power ceaseth, his property is lost: and by consequence an animal of this kind, which after any seizure escapes into the wild common of nature, and asserts its own liberty by its swiftness, is no more mine than any creature in the *Indies*, because I have it no longer in my power or disposal.

Hence it appears, that by the common law, every man had an equal right to such creatures as were not naturally under the power of man; and that the mere caption or seizure created a property in them.

By

By immediate taking and killing them, they belong to such person in the same manner as any other chattels, and cannot be taken from him; since the first seizure and caption was sufficient to vest the property of them in him..

Also by taking and taming them, they belong to the owner, as do the other tame animals, so long as they continue in this condition, that is, as long as they can be considered to have the mind of returning to their masters; for while they appear to be in this state, they are plainly the owner's, and ought not to be violated; but when they forsake the houses and habitations of men, and betake themselves to the woods, they are then the property of any man.

Another way of gaining property in them is, by inclosure; and then the beasts must be understood to be mine, as the profits of the soil it self are; and they can no more be taken and carried off, than any other profits of the land: and therefore if deer be inclosed in a park or paddock, or conies in a field or warren, they become so much a man's own, that no one ought to kill or take them away. And since in this case it is the inclosure that retains them (for take away the inclosure, and they are in their natural liberty) therefore the party is said to have right as he hath to any other profits there inclosed, and a distinct and independent right in every animal.

It is a maxim of the common law, that such goods of which no one can claim any property do belong to the king by his prerogative; and hence all those animals *feræ naturæ*, which come under the denomination of *game*, are styled in our laws *his Majesty's game*: and that which he hath, he may grant to another; and consequently another may prescribe to have the same, within such a precinct or lordship. And from hence cometh the right of lords of manors, or others, unto the game within their respective liberties.

And upon this foundation the several acts of parliament are established, for the preservation of these species of animals; for the recreation and amusement of persons of fortune, unto whom the king, with the advice and assent of parliament, hath granted the same; and to prevent persons of inferior rank, from squandering that time, which their station of life requireth to be more profitably employed. For these restrictions do not take from the common people any right which they ever had; but only grant unto some persons those privileges which before rested solely in the king. 2 *Bac. Abr.* 612, 613.

II. Certain observations concerning forests, chases, parks, and warrens.

1. A *forest* is a certain territory of woody grounds, and fruitful pastures, Forest, what. privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide there in the safe protection of the king, for his delight and pleasure: which territory of ground so privileged, is meered and bounded with unremovable marks, meers, and boundaries, either known by matter of record, or by prescription; and also replenished with wild beasts of venary or chase, and with great coverts of vert for the succour of the said beasts there to abide: for the preservation and continuance of which, there are particular

particular officers, laws, and privileges belonging to the same, requisite for that purpose, and proper only to a forest, and to no other place.

Manw. 143.

Note; That *vert* comprehends every thing which bears green leaves in the forest. *Manw.* 146.

Beasts of forest. 2. Beasts of forest are properly hart, hind, buck, hare, boar and wolf; but legally all wild beasts of venary. 1 *Inst.* 233.

Purlieu, what. 3. *Purlieu* comes from the French, *pur*, clear, entire, and exempt; and *lieu*, a place: that is, a place, entire, clear, or exempt from the forest: and signifies those grounds which *Henry* the Second, *Richard* the First, or *King John*, added to their ancient forests, over other mens grounds; and were disafforested by the statute of *charta de foresta*. 4 *Inst.* 303. *Manw.* 242.

But nevertheless the *purlieu* as to some purposes is forest still, and is disafforested as to the particular owners of the land and for their benefit, and not generally to give liberty to any man to hunt the wild beasts, and spoil the *vert*. And if those beasts do escape out of the forest into the *purlieu*, the king hath a property in them still against any man, but against the owners of the woods and lands in which they are; and such owners have a special property in them *ratione loci*, but yet so that they hunt them fairly, and not forestall them in their return towards the forest. *Manw.* 292.

But a *purlieu* man may not hunt in every man's lands within the *purlieu*, but in his own lands only; and therefore if he find the beasts of the forest in his woods or lands in the *purlieu*, in such case he hath a property in them against any other man *ratione soli* (the kingly only excepted). And if he begins the hunting in his own lands, then by reason of that property he may pursue his hunting thro' any man's woods or lands, so as he doth not enter into any forest, chase, park, or warren. And if he kill the beast in another man's land, and out of such privileged place, he may take and carry away the same by reason of the first property. But if the beast recover the forest, he must call back his dogs, for they are then the king's wild beasts again. And if he do not call back and rebuke his dogs, and they kill the beast in the forest, he is a trespasser, tho' himself never came within the bounds thereof. But if in hunting towards the forest, the dogs fasten on it before it is within the bounds thereof, and the dogs still hanging on are drawn by the deer into the forest, and it is killed there, then by reason of the first property which he had *ratione soli*, and also by the pursuit and possession thereof before it entred the forest, he may lawfully enter and take it. *Manw.* 194.

Chase, what.

4. A *chase* (from *chasser*, to chase) is a privileged place for receipt of deer and beasts of the forest, and is of a middle nature betwixt a forest and a park. It is commonly less than a forest, and not endowed with so many liberties, as officers, laws, courts; and yet is of a larger compass than a park, having more officers and game than a park. Every forest is a chase, but every chase is not a forest. It differeth from a park in that it is not inclosed, for if it is inclosed, it is a good cause of forfeiture; though it must have certain metes and bounds, but it may be in other mens grounds, as well as in one's own. *Read. Game.* *Manw.* 49.

5. Beasts

5. Beasts of chase are the buck, doe, fox, martern, and roe. *Manw.* Beasts of chase.
50.
6. A *park* (from the French, *parquer*, to inclose) is a large parcel of ground privileged for wild beasts of chase by the king's grant, or by prescription. *Read.* Game. Park, what.
7. The beasts of park properly extend to the buck, doe, fox; but in a common and legal sense to all the beasts of the forest. *Read.* Game. Beasts of park.
8. A park must be inclosed; for if it lies open, it is a good cause of seizure into the king's hands, as a thing forfeited: and the owner cannot have an action against those that hunt in his park, if it lies open. *Read.* Game. Park to be inclosed.
9. Deer in a park shall go to the heir, and not to the executor. *I Inst.* 8. Deer shall go to the heir.
10. A *warren* is a place privileged by prescription or grant of the king, for the preservation of the beasts and fowl of the warren; viz. hares, conies, patridges, and pheasants. *Read.* Game. Warren, what.
11. A free warren may lie open, there being no necessity of inclosing it. *Read.* Game. Need not to be inclosed.
12. Conies in a warren (as hath been said before of deer in the park) shall go to the heir, and not to the executor. *I Inst.* 8. Conies shall go to the heir.
13. It is not lawful for any man to erect a park, chase, or warren, without a licence under the great seal of the king; because the common law gives no way to matters of pleasure, for that they bring no profit to the commonwealth. *2 Inst.* 199. Licence to erect.
- But in the case of *K. and Sir William Lowther, M. 12 G.* There was a motion for leave to file an information in nature of a *quo warranto*, against *Sir William Lowther*, to shew by what authority he had made and set up a warren. But it was denied by the court; because it was of a private nature, and therefore proper to be prosecuted only in the name of the attorney general by information, if his Majesty thought fit. And the like motion had been denied before in the case of the Lord *Lisburn.* *L. Raym.* 1409. *Str.* 637.
14. A forest is the highest franchise of princely pleasure; the next to that is a free chase; a chase in one degree is the same as a park, only a park is inclosed, and a chase is always open; the next in degree to a free chase, is a park; and next unto a park, is the franchise of a free warren. *Manw.* 148. Which of these is the highest franchise.
15. A person may have common in a chase, as well as in a forest; but a forest is governed by the forest law, and a chase and park by the common law. *4 Inst.* 314. *Manw.* 49. Common in a chase.
16. If I find a pheasant in my lands, and I let my hawk fly, I may follow the flight into another man's land, by reason of the first property which I had in the pheasant *ratione soli*; and if my hawk kill the pheasant in another man's land, I may enter and take it, by reason of that property and pursuit, and in that case, I shall not be punished as a trespasser for taking and carrying away the pheasant, but only for entering the ground. But if the pheasant fly into a warren (which is a privileged place for birds of warren) and the hawk kill it there, the falconer shall not have the pheasant, but the owner of the warren. And the law is the same, in the cases of all wild beasts of the forest and chase. *Manw.* 193, 196. Trespass, in what case.

17. Not-

No trespass in following beasts of prey.

17. Notwithstanding the common law allows of the hunting of foxes and badgers, being beasts of prey, in another man's ground, because the destroying of them is looked upon as a publick benefit; yet the digging and breaking the ground to unearthen them is held to be unlawful, and the owner of the ground may maintain an action of trespass in that case. *Cro. Jac.* 321.

Game escaped out of the inclosure, may be retaken on fresh suit.

18. If conies are hunted out of the warren, or deer out of the park, and the warrener or parker pursue them, he may retake them; for the park or warren is an establishment by the publick, to look after and preserve the game; for all things unoccupied, in which no man hath a civil right, are under the regulation of the publick: now in parks and warrens, officers are established by authority, to have an eye over the game, and to keep it within the boundaries; so that the property is not altered by driving it out of the inclosures, unless it be also out of the pursuit of the officers; for as long as he that is thus trusted doth pursue it, it is not in its natural liberty, but is still belonging to the park or warren. 2 *Bac. Abr.* 613.

III. Concerning gamekeepers.

Who may appoint a game-keeper.

By the act 10. *W. 3. c. 8.* All lords of manors not under the degree of an esquire, may by writing under their hands and seals authorize game-keepers within their respective manors or royalties, who may seize all such guns, hounds, grayhounds, beagles, land spaniels or setting-dogs, as within the precincts of such respective manors or royalties, shall be used by persons who by this act are prohibited to keep or use the same. *Stat.* 14.

And the said game-keepers or other persons being authorized by warrant of any justice of the same county, may in the day-time search the houses or other places of any persons by this act prohibited to keep or use the same, as upon good ground shall be suspected to have any guns, hounds, grayhounds, beagles, land-spaniels or setting-dogs, and the same to seize and keep for the use of the lord of the manor or royalty where the same shall be found.

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All lords of manors or other royalties not under the degree of an esquire or persons so authorized by them, may within their respective manor or royalties oppose and resist such offenders in killing or destroying the game contrary to this act in the night-time, in the same manner and be equally indem-

indemnified for so doing, as if such fact had been committed within any ancient chase or warren. *f. 15.*

It hath been adjudged, that an authority from the lord of the manor is not of itself sufficient for this purpose, but that he ought to have a warrant from a justice of the peace. *Comb. 183. Carpenter and Adams.* At least it may be safe to have such warrant, especially if any houses are to be entered and searched.

For it would give too great a power to the gamekeepers, to leave it in their discretion to search what places they shall think proper, as also to constitute them the judges whether such or such a person is or is not qualified to kill game. Therefore it is best to have a warrant from a justice of the peace, after information and oath of the offence first made.

IV. Qualification by estate or degree to kill game; with the punishment of persons unqualified.

1. The first qualification relating to the game, was in the 13th year of the reign of *R. 2.* by which it is enacted, that no layman which hath not lands or tenements of 40*s.* a year, nor clergyman if he be not advanced to 10*l.* a year, shall have or keep any greyhound, hound, or other dog to hunt; nor shall use ferrets, hays, nets, harepipes, nor cords, nor other engines for to take or destroy deer, hares, nor conies, nor other gentlemens game: on pain of a year's imprisonment. And the justices of the peace (that is, in their sessions) shall enquire of the offenders in this behalf, and punish them by the pain aforesaid. *13 R. 2. c. 1. ft. 13.*

2. The next qualification was by a statute in the 10*W. 3. c. 8.* whereby it is enacted, that no person not having an estate of freehold in his own or his wife's right of the yearly value of forty pounds, or a personal estate of the value of one thousand pounds, over and above all debts, either for himself or as servant to any other, unless he be such servant as hath no other way of lively for his wages from such person, shall keep any hound, beagle, grey-hound or land spaniel, except whelps under the age of twelve months which shall be kept at nurse for persons qualified within this act, on pain that such hound &c. or spaniel, shall be seized by any justice of the peace of the counties where the same shall be so kept, or by any persons authorized by warrant under the hand and seal of such justice, or by any person having a free-hold of the yearly value of forty pounds or upwards within such county, which justice of the peace and free-holder respectively seizing such hound, &c. or spaniel may detain or otherwise dispose of them as they shall think fit. *f. 1.*

3. And all persons keeping such hound, &c. or spaniel contrary hereunto, and being thereof convicted before some justice of the peace of the county where such offence shall be committed, on the oath of one credible witness, shall for every such offence forfeit five pounds, to be levied by warrant of such justice by distress and sale of the goods of such offender, &c. one moiety thereof to the informer, the other moiety to be issued for the use of the poor of the parish where such offence shall be committed. *f. 2.*

4. Nothing herein contained shall extend to restrain tenants to any persons, not restrained by this act, from having and keeping any hound, beagle, spaniel or greyhound for the use of their landlord, so as such tenant shall not hunt, course or make use of such hound, &c. but in the company and attendance of his landlord only. *f. 9.*

5. No person not having an estate of freehold of the yearly value of one hundred pounds or a personal estate of the value of one thousand pounds, shall keep any setting dog, other than such persons as shall be licensed thereunto, by the justices of peace of the county where he shall live, at the general quarter sessions of the peace to be held for such county next after *Christmas* in every year, in order to the training up setting-dogs, and that under such regulations only as shall be specified in such licence; and such persons shall every two years during the continuance of such their licence, teach one or more hounds to hunt on dry foot, and in default thereof such licence shall become of no force, and shall be deemed so to have been from the granting the same, and the persons to whom the same was granted shall be liable to the same penalties as if they had acted without such licence. *f. 10.*

6. No person keeping a gun to fowl with as servant to any person not restrained by this act from keeping the same, shall sell or dispose of any fowl or game they shall kill, but shall bring all such fowl or game to their master's house, on pain that every person offending shall for every such offence forfeit twenty shillings; the said offence to be heard and determined by such justices of the peace, and the forfeiture for the same levied *on the goods of the offender by warrant under the hand and seal of such justices, and paid one moiety to the poor of the parish where the offence shall be committed, and the other to the informer.* *f. 11.*

7. No papist or reputed papist shall be employed as fowler for any protestant, or under colour thereof shall keep, carry, or use any fire-arms, and if any fire-arms shall be found in the possession of any such papist or reputed papist not qualified to keep the same by the laws now in force, the same shall be seized by warrant of any justice of the peace of the county where the same shall be found, which warrant such justice on information to him given is required to grant, and such fire-arms as shall be so seized, shall immediately after such seizure become the property of the persons giving information touching the same, notwithstanding that such fire-arms at the time when the same were so seized in the possession of such papist or reputed papist did really belong to some protestant or person qualified to keep fire-arms. *f. 4.*

8. No non-commissioned officer or private soldier, shall be permitted to go out of his quarters with any fire-arms, unless the same be on a march or a commanded party by command of the officer in chief then present and commanding in such quarters, on pain that such non-commissioned officer and private soldier being thereof convicted before some justice of the peace for the county where such offence shall be committed, shall for every such offence forfeit five shillings, to be paid to such persons as shall give information of and make out such offence before such justice, and to be levied on the warrant of such justice by distress and sale of goods of the person offending, rendering the overplus to the party distrained on. *f. 11.*

9. And

9. And in case no sufficient distress shall be found, the persons so offending shall by warrant of such justice be sent to the common gaol for such county, there to be kept in close custody without bail or mainprize for ten days.

10. And the officer in chief in such quarters to which such offender shall then belong, shall on demand render the body of the offender into the hand of the justice or other civil magistrate to be dealt with according to law, and in case such officer shall refuse to deliver up such offender, such officer being thereof convicted before one justice of the peace of the county where such quarters shall be, shall for such offence forfeit five pounds, to be levied on the warrant of such justice, by distress and sale of the goods of such officer rendering the overplus if any be, one moiety whereof shall be to the use of the poor of the parish where such offence shall be committed, the other moiety to them that shall inform of and make out such offence before such justice.

11. No commissioned officer or any person employed under him, shall shoot or course with gray-hounds, any deer, hare, or other game, except on his own ground, or by the permission first had of the owner of the ground where they shall so hunt or course, on pain of forfeiture of five pounds for every such offence; which offences shall be heard and determined before one justice of the peace for the county where the same shall be committed; and the said forfeiture to be levied, distributed, and divided in the manner herein before appointed. *f.* 12.

12. Every constable or other person authorized by warrant of one justice of the peace, shall have power, and is hereby required to enter into and search, in such manner and with such power as in case where goods are suspected to be stolen, the houses or other places belonging to such houses of suspected persons not qualified as aforesaid; and in case any venison, hare, partridge, pheasant, pidgeon, fish, fowl, or other game, shall be found, the offender shall be carried before some justice of the peace of the same county. *f.* 13.

13. And if such person do not give a good account how he came by such game, &c. as shall satisfy the said justice, that the same was not taken contrary to this act, or shall not in some convenient time to be set by the said justice not exceeding six days, produce the party of whom he bought the same, or some other credible person to depose upon oath such sale thereof, such person shall be convicted by the said justice of such offence.

14. And shall forfeit for every hare, partridge, pheasant, pidgeon, fish, fowl, or other game or venison, any sum not under five, and not exceeding twenty shillings, to be ascertained by the said justice, one moiety thereof to be paid to the informer, and the other moiety to the poor of the parish where such offender shall live, the said forfeiture to be levied by distress and sale of the offenders goods, by warrant under the hand and seal of the justice before whom the offender shall be convicted, rendering the overplus if any be.

15. And for want of distress the offenders shall be committed to the house of correction, for any time not exceeding one month, and not less than ten days, there to be whipped and kept to hard labour.

16. And in case any person charged with the said offence, shall not before the same justice give such evidence of his innocence as aforesaid, he shall be convicted thereof in the same manner as the persons first charged therewith is hereby directed to be, and so from person to persons till the first offender shall be discovered.

17. It shall be lawful, after such conviction as aforesaid, to the constable or other persons prosecuting to detain in custody such offenders, in case they shall not presently pay the monies due by such conviction, during such reasonable time as a return may be conveniently made to the warrant for the distress upon such conviction, so as such detainer do not exceed two days. *f. 16.*

18. Where any offender shall be punished by force of this act, he shall not be prosecuted upon nor incur the penalty of any other law for the same offence. *f. 17.*

19. Persons sued or prosecuted for any thing which they shall do in pursuance of this act, may plead the general issue, &c. and if the verdict shall pass with the defendants, or the plaintiffs become non-suit or suffer discontinuance thereof, such defendants shall have treble costs. *f. 18.*

20. If any *tradesmen apprentices, and other dissolute persons*, shall hunt, hawk, fish, or fowl, unless in company with the master of such apprentice duly qualified by law, such persons shall be liable to the same penalties as the persons on whom game shall be found are liable to by this act, and may also be sued for their wilful trespasss in coming on any person's land, and if found guilty thereof, the plaintiff shall not only recover his damages but full costs of suit. *f. 19.*

21. Nothing herein contained shall restrain any person within any manor from keeping hounds, beagles, grey-hounds, spaniels, or setting-dogs within the same, so as the same be allowed of and kept with the permission of the lord of the manor, in which the same shall be kept, appearing by licence under the hand and seal of such lord of the manor. *f. 20.*

22. But by a statute 11 G. 2. c. 12. *If any person, not qualified by the laws of this realm so to do, shall keep or use any grey-bounds, setting-dogs, bays, lurchers, tennels, or any other engines to kill and destroy the game, and shall be thereof convicted (C D) on the oath of one credible witness, before one justice, he shall forfeit 5l. half to the informer, and half to the poor of the parish where the offence was committed, to be levied by distress (E); and for want of such distress, the offender shall be publicly whipped on some market-day through some market-town within the county where such offence shall be committed.*

And it shall be lawful for any justices of the peace in their respective counties, to take away any such dogs, nets, or other engines which shall be in the custody of any persons not qualified to keep the same to their own use. *f. 4.*

Not qualified by the laws of this realm] On a conviction on this statute, exception was taken, that the conviction reciting the defendant not to be a person so and so qualified, and enumerating distinctly the several qualifications

tions in 22 & 23 C. 2. omitted a new qualification allowed by this act, namely, that he was not a person authorised by a lord (or lady) of a manor to kill game for his use. And by the court; Had it been generally laid thus, that he not being a person qualified according to law, and so on, it had been enough; but the qualifications being distinctly and severally mentioned, the omission of one is fatal. 10 Mod. 26 T. 10 An. Q. and Matthews.

But in the case of *K. and Marriott, M. 4 G.* There was a conviction for keeping a greyhound; reciting that one *William Tounne* came and informed, that the defendant being a person not qualified to keep a greyhound, did nevertheless keep one at such a place, and therewith killed several hares; and that he being summoned did appear, and being asked what he had to say, offered nothing in excuse, and therefore the justice convicted him. It was objected, that the justice should set out, why the defendant is not a qualified person, as that he is not the son of an esquire, nor has 100 l. a year in his own or his wife's right: For he ought not to make himself the sole judge, but give the reasons at large. *Parker Ch. J.* seemed to think the conviction would be good, having followed the words of the statute, and that if the defendant was qualified, he ought to have shewn it before the justice being summoned for that purpose. *Eyre J.* started an objection, that it was not the justice that had taken upon him to say the defendant was not qualified; but only the witness: for the conviction runs, that the witness being sworn, saith, that the defendant *being a person no way qualified* did such a day keep a greyhound; so that it appears, the witness has given the law to the justice, and takes upon himself to judge of the defendant's qualifications, and the justice is only made use of as an instrument, to reduce the opinion of the witness into a conviction. By *Parker Ch. J.* the *being not qualified* should be the conclusion of the justice, and not the words of the witness; for he ought not to swear generally a man is not qualified, and such a general proof will not be good: This is only an invention, to support a conviction in general terms, which would be bad if the particular facts were alleged, *Pratt J.* Where the justices have a summary jurisdiction, and no appeal lies (as in this case) we must keep them up strictly to the law; and I should be glad if we could make them set out the whole particularly. The case was adjourned. And afterwards *Pengelly* serjeant mentioned two cases, Q. and *Hayward, E. 12 An.* There it was, *not being qualified, licensed, or authorized to keep any engine*: and it was quashed. The other was the same term, and quashed, because no qualifications were mentioned. And towards the end of the term this conviction was quashed; and the principal reason declared to be, because the witnesses had taken upon themselves, to judge of the qualifications. *Str. 66.*

And in the case of *K. and Hill, H. 12 G.* the defendant was convicted for unlawfully keeping a lurcher and a gun to kill and destroy the game, *not being qualified by the laws of this realm, so to do.* And the conviction being removed into the king's bench by certiorari, was quashed; because it was only averred generally, that he was not qualified, and did not aver that the defendant had not the particular qualifications mentioned in the statute, as to degree, estate, and the rest. *L. Raym. 1415.*

And in the case of *K. and Bryan, M. 12 G. 2.* which was a conviction on the gin act, exception was taken, that there was no averment, that it was
not

not sold to be used in medicine: and the cases on the game act were mentioned, where in convictions it is necessary to exclude all the qualifications for killing game. On the other hand, it was insisted that the reason of that was, because those were in the enacting clause, whereas this about medicine comes in by way of proviso, and is by way of defence to be shewn on the defendant's part. And for that purpose was cited *K. and Theed, M. 11 G.* where in a conviction for obstructing an excise officer on the 8 *An. c. 9.* it was objected, that it not being averred to be in the day, it should have been shewn that there was a constable present, which is made necessary in the night; but it was held to be well, and that its being in the night should have been shewn on the defendant's part. And by the court, This is brought within the general enacting clause: and the true distinction is, where the extenuation comes in by way of proviso, or exception. And the conviction was confirmed. *Str. 1101.*

Finally, in the case of *K. and Jarvis, H. 30 G. 2.* The defendant was convicted for using a setting dog and having in his possession one net. The conviction stated generally, that *he was not qualified.* On removal of the conviction by certiorari into the court of king's bench, it was moved to quash it. And by the court: It is bad; for the particular qualifications mentioned in the statute of 22 & 23 *C. 2.* ought to have been enumerated in the conviction. And *Foster J.* said, it was a general rule, that where negatives are the description of the offence, they ought to be set forth.

Shall keep or use] *H. 8 G. K. and Filer.* Conviction for *keeping* a lurcher to destroy game, not being qualified. Exception was taken, that it was not shewn he *used* the dog to destroy game; and it may be he only kept it for a gentleman who was qualified, it being common to put out dogs in that manner. But by the court, The statute is in the disjunctive, *keep or use*; so that the bare *keeping* a lurcher is an offence; and so it was determined in the case *K. and King, E. 3 G.* which was a conviction for keeping a gun; and it was not doubted by the court, whether the *keeping* was not enough to be shewn, but the only question they made was, whether a gun was such an engine as is within that statute: and in that case a difference was taken, as to the keeping a *dog*, which could only be to destroy the game; and the keeping a *gun*, which a man might do for the defence of his house. And the conviction was confirmed. *Str. 496.*

Use] In the case of *K. and King* aforesaid, *Parker Ch. J.* said, that walking about with intent to kill game, is evidence of *using* the instrument for that purpose. *Seff. C. V. 1. 88.*

Any greyhounds, setting dogs, bays, lurchers, tunnels, or any other engines] *H. 13 G. 2. Hooker and Wilks.* An action of debt was brought on the 8 *G. c. 19.* for the penalty of 30*l.* for using a *bound* to destroy game. And after a verdict for the plaintiff, the judgment was arrested; for the statute of the 5 *An. c. 14.* has not the word *bound*, and the words *other engines* come after *nets*, and are applicable only to inanimate things. And this being a penal law, cannot be extended. The statute of the 22 & 23 *C. 2. c. 25.* has

has indeed general words, *or any other dogs to destroy game*; but this is not a conviction on that statute. *Str.* 1126.

Nor indeed could it have been a conviction on that statute, for any penalty in certain for killing and destroying the game; for the statute of the 22 & 23 C. 2. doth not inflict a general penalty, upon persons unqualified who shall kill and destroy the game; but only declares, who shall or shall not be deemed unqualified; and gives power to lords of manors and their gamekeepers to seize the dogs, nets, and other engines of such unqualified persons. But if the defendant did kill the game, and had the same in his custody; he might have been prosecuted for the penalty of 20*s.* for such offence, by the statute of the 4 & 5 W. hereafter following.—But then the consequence of all this will be, that it is not penal barely to *keep a bound* on this statute of the 5 An. but if any unqualified person shall do so, the gamekeepers or others, authorized by a justice's warrant, may seize and keep or destroy the same, by the afore said statute of the 22 & 23 C. 2. So in the case of *Reason and Lisle*, T. 11 G. 2. On an action upon the statute, the plaintiff declared, that the defendant kept and used a *dog* to destroy the game. It was objected, that he ought to have expressed what sort of dog; for it might be a mastiff or a lap dog, which might chance to kill game; and the statute only mentions greyhounds, setting dogs, and lurchers; and this, being a penal law, shall not be extended by equity. And of this opinion was the court. And judgment was arrested. *Comyns*, 576.

Any other engines] T. 11 G. 2. *K. and Gardiner*. It was moved to quash a conviction, for unlawfully having and keeping a *gun*, being an engine or instrument for destroying the game. And it was urged, that this is no sufficient charge within this act, or any other of the laws relating to the game: for it is not said, that the defendant *used* the gun for the destruction of game; and a gun is not an instrument so far appropriated to killing game, as that it is criminal for a person to have one in his custody only: And it would have been altogether as well, if it had been said, that the defendant had in his custody a *cane* for the destruction of the game, which may possibly be used for that purpose. The only offences intended to be prevented by the act are, the keeping of engines appropriated to, and which can only be used in, the destroying of game. A gun is an engine, not for killing the game but for the defence of a man's house. And the whole court were clearly of opinion, that this conviction is not good. For (as they argued) if the statute is to be construed so largely, as to extend to the bare having of any instrument, that may possibly be used in destroying game, it will be attended with very great inconvenience; there being scarce any, though ever so useful, but what may be applied to that purpose. And though a gun may be used in destroying game, and when it is so, doth then fall within the words of the act; yet as it is an instrument proper, and frequently necessary to be kept and used for other purposes, as the killing of noxious vermin, and the like, it is not the having a gun, without applying it in the destruction of game, that is prohibited by the act: but otherwise it is of lurchers, harepipes, and such like, which are peculiarly fitted or disposed for killing game. The bare *keeping* of these for the purpose of killing game, is sufficient to convict an offender, and it will be incumbent upon the defendant himself to prove, that he kept them for other purposes. And the conviction there-

therefore was quashed. After which *Strange* solicitor general said, that in the case of *K. and King*, *E. 3 G.* Lord *Macclesfield* said, that he was in the house of commons when this act was made, and he himself objected to the inserting of the word *gun* therein, because it might be attended with great inconvenience. *Andr. 255. Sess. C.V. 2. 204. Str. 1098.*

And indeed it was not at all necessary to insert a gun in this act; since the carrying of a gun is prohibited under double the penalty, by the statute of *H. 8.*

And shall be thereof convicted] *H. 6 G. K. and Johnson.* Conviction for keeping a gun, not being qualified. Exception was taken, that here was not a reasonable summons; for it was made on the fifth of *October*, to appear the same day, which might be impossible upon account of distance, or the summons being served late, and his witnesses might not be got together on so short a warning: then it is to appear at the parish aforesaid, whereas there are two parishes mentioned before; so the man may have gone to one, whilst they were convicting him at the other. It was answered, that the defendant appeared at the time and made defence, so that cures all defects in the summons. And by the court, The answer is right. *Str. 261. H. 5 G. 2. K. and Heber.* On a rule to shew cause, why an information should not be granted against the defendant *Mr. Heber*, a justice of the peace; for convicting two persons, *Hargrave* and *Lancaster*, for killing game, not being qualified; the complaint in relation to *Hargrave* was, that the defendant sent his warrant for him, by which he was arrested, without any previous information upon oath; in relation to *Lancaster*, the complaint was, that he happening to be present at the time *Hargrave* was convicted, the defendant took that opportunity of convicting him also, without giving him any previous summons, by which he might prepare himself for his defence. The court (the chief justice being absent) were very clear, that an information ought to go against the defendant for his behaviour in relation to *Lancaster*; for they said, it was a most known rule of common justice, that no man ought to be convicted of an offence, till he has previous notice given him of the charge, that he may be prepared to put in his answer to it. Accordingly the rule, as to him, was made absolute. As to *Hargrave*, judge *Probyn* thought, that the rule, with respect to him also, ought to be made absolute. He said, a warrant deprives a man of his liberty; and therefore a summons ought only to issue, and not a warrant, without an information upon oath. The other two judges did not think this a sufficient cause for granting an information. And therefore the rule, with respect to *Hargrave*, was discharged.—In this case, the court would not proceed to make a rule to shew cause, until the convictions were removed thither by certiorari: for, they said, if there was no conviction, there ought to be no information; and if there was a conviction, this ought to appear by the record. 2 *Barnardist. 34, 77. 101.*

On the oath of one credible witness] *H. 9 G. K. and Gage.* The defendant was convicted for using a greyhound in killing hares. Exception was taken to the conviction, that the statute hath only given the justices jurisdiction to convict upon the oath of one or more credible witnesses, whereas this was

was upon his own confession, which it was insisted the justices had no power to take. But by the court, the conviction must be confirmed. The intent of mentioning the oath of one witness, was only to direct the justices, that they should not convict on less evidence: suppose the confession had not been before the justices, but before two witnesses who had sworn it; that would be convicting him on the oaths of witnesses, and yet the evidence would not be so strong as this. Here the justices had a better evidence, than the oath of any single witness; and it is a monstrous thing to say, that a better sort of evidence shall not do. *Str.* 546.

Credible witness] *M.* 2 *G.* 2. *K.* and *Stone*. A conviction was quashed, because the *informer* was the witness; divers convictions having been quashed for the same reason before. *L. Raym.* 1545. The same adjudged in the case of *K.* and *Blaney*, *T.* 11 *G.* 2. *Andr.* 240. And in the statute of the 2 *G.* 3. *c.* 19. it is recited, that in prosecutions on the act of 8 *G.* *c.* 19. in the courts of *Westminster*, where a part of the penalty is given to the poor of the parish, the *inhabitants* of such parish had been disallowed to give evidence; and therefore in that case, to remedy the same, the act gives the whole penalty to the prosecutor, in order to enable the inhabitants to give evidence.

Before one justice] *H.* 12 *G.* *K.* and *Buck*. It was moved, to quash an indictment for killing a hare, this not being a matter indictable, the statute appointing a summary proceeding before justices of the peace; and a case was cited *K.* and *James*, *T.* 1 *G.* where an indictment for keeping an ale-house was quashed, because the statute of the 3 *C.* *c.* 3. had directed a particular remedy. And by the court, the indictment must be quashed. *Str.* 679.

*Shall forfeit 5*l.**] *T.* 10 *Ann.* *Q.* and *Matthews*. On a conviction, exception was taken that the person was charged with so many 5*l.* as he had killed hares in the same day. And the court was of opinion, that the offence for which the statute gave the forfeiture, was the keeping dogs and engines, and not killing the hares. If a man not qualified goes a hunting, and kills never so many hares on the same day, he would forfeit but one 5*l.* for it is but one offence; but if a man keeps dogs, and goes a hunting several days, and kills hares, if it was thus laid, that he such a day kept dogs and killed, and then again such a day, by laying thus severally, the offence is severed, and he shall forfeit 5*l.* for each offence. 10 *Mod.* 26. So in the case of *Marriott* and *Shaw*, *E.* 4 *G.* where the defendant was convicted, that upon such a day he kept and used a greyhound to kill and destroy the game at such a place, that on the same day he kept and used a greyhound to kill and destroy the game at another place, and so at a third place, and killed several hares at the said several places; it was adjudged by the court, that this being all done on the same day, was only one offence; for this statute does not give 5*l.* for every hare; but only says, if any unqualified person shall keep or use any greyhounds, or the like, to kill and destroy the game, he shall forfeit 5*l.* *Comyns*, 274.

To the poor of the parish where the offence was committed] In some places a man may stand in one parish (or county), and shoot into two or three: in such case, the place where the offence was committed is, where the party stood when he shot, and not where the object was which he shot at. *Show.* 339. *M. 3 W. K. and Alsop.*

By distress] *T. 9. G. K. and Burchet.* The court ordered an attachment (unless cause shewn) against the town clerk of *Guildford*, and a defendant convicted on the game act, for granting and suing out a replevin of goods distrained for the penalty. But on shewing cause the next term, when *Eyre J.* only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and in that case the king's bench never interposes. *Str.* 567. But in the case of the *King* against the sheriff of *Leicestershire* and others, *M. 2 G. 2.* An attachment was moved for against the defendants, for replevying three horses, which were seized as forfeited upon a justices warrant, they being driven in a waggon contrary to act of parliament. The court, tho' they would not grant an attachment, yet made a rule to shew cause why an information should not go. And on shewing cause, the court thought there was enough to excuse the sheriff; but granted it against the person whose horses were seized, because he knew that the justice had granted this warrant; but it did not appear that the sheriff did. *1 Barnardist.* 110.

For want of distress to be sent to the house of correction] *T. 12 G. Hill and Bateman.* Before *Raymond Ch. J.* at *Westminster.* The defendant *Bateman*, being a justice of the peace, had convicted the plaintiff for destroying game, and though (as it was proved) the plaintiff had effects of his own, which might have been distrained, which were sufficient to answer the penalty he had incurred, yet the defendant sent him immediately to *Bridewell*, without endeavouring to levy the penalty upon his goods: and an action of trespass and false imprisonment being brought against *Bateman* for this commitment, the chief justice was of opinion, that the action well lay. And it was agreed, that where actions of this kind are brought against justices of the peace, they are obliged to shew the regularity of their convictions; and the informations, &c. laid before them, upon which their convictions are grounded, must be produced and proved in court. *Str.* 710.

23. And by the 3 *G. 3. c. 23.* all the articles and clauses in the laws now in force in this kingdom for the better preservation of the game, which are not hereby altered, shall have and retain the same force and duration as before the making of this act. *f. 1.*

24. All persons seized in their own rights, or in the right of their wives, of any legal or equitable estate (and not as a trustee or mortgagee) in lands in fee simple, fee tail, as tenant by the courtesey, or in dower, or as tenant for life under any will, deed, or settlement, shall have the sole and absolute property in all kinds and species of game on their respective estates and lands. *f. 2.*

25. No person, except those herein after provided for, shall go or enter upon the land of any other person to look for, set, spring, shoot, start, course, hunt, hawk, or otherwise pursue or take any sort of game, unless in company with the owner, or some one of the owners (if there be more than one) of the inheritance of such land, or with the tenants for life of such land, not subject to any rent (quit or crown rent only excepted) or by a licence for that purpose, under the hand of such inheritor or tenant for life, first obtained.

26. And every person offending in any of the particulars herein set forth, being thereof convicted at the prosecution of such inheritor or tenant for life, or of the occupier of such land before two justices of the peace of the county where such offence shall be committed, either on the offending parties own confession, or on the oath of one credible witness, shall for every such offence forfeit ten pounds, to be levied by warrant of such justice of the peace before whom such offender shall be convicted, by distress and sale of the goods of such offender, returning the overplus (if any there be) to the party distrained.

The one moiety of such penalties to be paid to him who shall prosecute for the same, the other moiety to the churchwardens for the repair of the highways of the parish where such offence shall be committed.

And in case no sufficient distress shall be found, the persons so offending, shall by warrant of such justice of the peace, be sent to the next house of correction, or to the common county gaol, there to be kept in close custody without bail or mainprize for one month. *f. 3.*

27. All persons who now are seized or possessed by virtue of any fee-farm lease, or lease for ever, or of any lease for one or more life or lives, or years, and all persons deriving under, or duly authorized by such persons, shall have the same right to look for, set, spring, shoot, start, course, hunt, hawk, or otherwise pursue any sort of game, on the lands of which such persons are seized or possessed as aforesaid, as such persons now enjoy by the laws now in force in this kingdom. *f. 4.*

28. Nothing herein contained shall extend, to deprive any person duly qualified, and keeping hounds of his own, of such privileges of beating for hares, as he with his usual and necessary attendants might have had before the passing of this act. *f. 5.*

29. Provided that every such prosecution be commenced within three kalendar months after the offence committed, and that the prosecutor or party convicted may appeal from every such adjudication to the next going judges of assize for the county where such offence shall be committed, who are hereby required to hear and determine every such appeal.

30. No collusive prosecution shall barr any other person hereby qualified to carry on a prosecution for the said offence, such other prosecution being carried on within the said three months after the offence prosecuted. *f. 6.*

31. No one offence shall be twice punished, and that where any offender shall be once punished by force of this act, he shall not again be liable by virtue of any other law to answer again for the same offence. *f. 7.*

32. Nothing herein contained shall subject any persons duly qualified by the laws now in being, to hunt for or to kill game, his, or their servants or necessary attendants, to any of the penalties hereby inflicted for following or pursuing their game into the lands of other persons. Provided that such other persons may have such remedies, and such redress against persons so following their game, for any damage they shall do, as such other persons are intitled to for such damage by the laws now in being. *f. 8.*

33. All lords of manors, and other royalties, shall have and enjoy the same rights and privileges concerning the game, within their respective manors or royalties, as fully and amply in every particular, as if this act had never been made. *f. 9.*

*This Act is ex-
=piled, & notes=
=new'd.
Renew'd in 1774*

This act shall continue in force for two years, from the first day of May one thousand seven hundred and sixty four, and to the end of the then next session of parliament.

V. Laws for preserving the four footed game in particular,

Which said laws, as hath been said, do seem to concern all persons whatsoever, whether qualified or not.

Now the four footed game, or the game of beasts, are of three kinds, *viz.*

I. Deer.

II. Hares.

III. Conies.

I. Of deer.

1. **T**HERE have been many laws from time to time enacted against deer stealers; which being not so much altered, as enforced by the subsequent statutes, except only in increasing the penalties, it may be proper to insert them all in their order; and the rather, because an offender, as it seemeth, may still be convicted upon any one of them; and it is generally provided, that such conviction upon one statute, shall be as a bar to all the rest.

Three years
imprisonment
and fine.

2. The first statute is in the 3 *Ed. 1. c. 20.* which enacts, that if *trespassers in parks* be thereof attainted at the suit of the party, great and large amends shall be awarded according to the trespass, and they shall have three years imprisonment, and after shall make fine at the king's pleasure (if they have whereof,) and then shall find good surety that after they shall not commit the like trespass: and if they have not whereof to make fine, after three years imprisonment, they shall find like surety; and if they cannot find like surety, they shall abjure the realm. And if none sue within the year and day, the king shall have the suit.

Trespassers]

Trespassers] This is when a man either cheaseth in a park, or endeavours to kill some of the game thereof. 2 *Inst.* 199.

In parks] This act, because it is very penal, is to be understood, not of a nominal park erected without warrant, but of a lawful park only, whereunto three things are required. 1. A liberty, either by grant or prescription. 2. Inclosure, by pale, wall, or hedge. And 3. Beasts savages of the park. 2 *Inst.* 199.

2. The next statute is that intituled *De malefactoribus in parcis*, 21 E. 1. ft. 2. which enacts, that if any forester, or parker, shall find any trespassers wandring within his liberty, intending to do damage therein, and that will not yield themselves after hue and cry made to stand unto the peace, but do continue their malice, and disobeying the king's peace do flee, or defend themselves with force and arms; altho' such forester, parker, or their assistants, do kill such offenders, they shall not be troubled upon the same. They may be lawfully resisted.

3. The next statute makes hunting by night, or in disguise, and concealing the same, felony; but within the benefit of clergy, as follows: By night, or disguised, and concealing the same, felony.

When *information* shall be made, of any unlawful hunting, in any *forest or park*, by night, or with painted faces, to any of the king's counsel, or to a justice of the peace, of any person to be suspected thereof, he may make a warrant to take and arrest the person, and to have him before the maker of the warrant, or any other of the said counsel, or justices of the peace: who may by their discretion examine him of the said hunting, and of the said doers in that behalf: And if the same person *wilfully conceal* the said huntings, or any person with him defective therein, that then the same concealment be, against every such person so concealing, felony. But if he then confess the truth, and all that he shall be examined of, and knoweth in that behalf, then the said offences of hunting by him done, shall be but trespass, finable at the next general sessions. And if any rescous or disobedience be made to any person having authority to execute the warrant, by any person the which so should be arrested, so that the execution of the warrant thereby be not had, then the said rescous and disobedience shall be felony. And if any person shall be convict of any such huntings, with painted faces, vizors, or otherwise disguised, to the intent they should not be known, or of unlawful hunting in time of night, then the same person so convict, to have like punishment as he should have if he were convict of felony. 1 H. 7. c. 7.

When information shall be made] This information must shew at least just cause of suspicion; and it must be taken in writing, because it is the ground of the warrant. 3 *Inst.* c. 21.

In any forest or park] This doth not extend to a chase, nor to any forest or park in use or reputation, which are not so in law. 3 *Inst.* c. 21.

Wilfully conceal] Lord Coke, who is a lover of the common law, and is jealous of every violation of it, seemeth to be out of humour with this act, and

and calls it an ill-penned law. He observes it is the first that was made for the making of any hunting felony, against that excellent and equal branch of *charta de foresta*, *nullus de cætero vitam vel membra amittat pro venatione nostra*; and that this, and other old statutes concerning the forest, are called the good old laws and customs, and commanded to be observed; and therefore this new act is too severe for wild beasts, whereof there can be no felony at the common law. And therefore the judges (he says) have made a favourable construction of it, as is set forth in the following notable report:

M. 19 & 20 El. In the king's bench. *Gerrard* the Queen's attorney-general (who was a grave and reverend man) said openly, that it had been resolved by the judges upon this statute, that if a man in the night, or by day with painted face, do hunt as above, and being examined according to the act doth conceal it, yet this is upon the construction of the whole act no felony. For the first clause concerning the concealment, and the last clause concerning the fact itself, must be coupled or joined by construction together; that is to say, If any person be convicted of such hunting with painted face, or of unlawful hunting in the night, this conviction must be upon not guilty pleaded; which the judges expounded to be the concealment intended in the first branch; for they held that it ought to be a judicial concealment, and not an extrajudicial concealment before one of the counsel or a justice of the peace, which may lie in averment, so as before it be felony he must be convicted of such hunting upon not guilty pleaded first, and after such conviction, then he must be indicted again upon the whole matter, that he feloniously did conceal it, against the form of the statute; and if the offender upon the first indictment confesseth the indictment, when it is such a judicial confession as this act intendeth, and no felony within this statute.

This he says, he heard the attorney report, and did then observe it; which concurring with his opinion, he thought good to publish, and the rather, because in *Lambard's* justice, amongst his precedents of indictments, there is an erroneous precedent (he says) of an indictment of felony for the concealment upon the examination before a justice of the peace. And upon the whole, he thinks it the clearest way to make it trespass, and not felony; which the party may do at his pleasure. *3 Inst. c. 21.*

But lord *Hale* says, that this seems a difficult exposition; for upon his arraignment for the hunting, he only answers to that indictment, and is not examined touching others; and besides, if he be indicted for the hunting, if there be evidence to convict him of the fact, he is convicted of felony before the indictment for concealment come; and if there be not evidence to convict him of the principal, how shall there be evidence to convict him of the concealment? *1 H. H. 659.*

Shooting deer.

1. By the act 10 *W. 3. c. 8.* No person shall shoot any deer at any season of the year, except on his own ground only, or on the ground of such persons to whom the person shooting such deer, being a protestant, shall be a menial family servant at the time of shooting the same, and that by warrant only under the hand of such his master, and no otherwise. *f. 5.*

On pain, that every person so offending, being thereof convicted before one justice of the peace of the county where such offence shall be committed, on oath

oath of one credible witness, shall, for every such offence, forfeit five pounds, one moiety to be to the use of the poor of the parish where such offence shall be committed, the other moiety to them who shall give information, and make proof of such offence.

The same to be levied on the goods and chattels of the offender, by warrant under the hand and seal of such justices, who are to grant such warrant and to order payment of the money levied thereby accordingly.

2. No person shall in any year hunt, course, or kill any male deer before the 10th day of *June* in such year, nor any male fallow deer after *Michaelmas* in any year, unless in the proper ground of the person hunting, coursing, or killing the same, on pain that every person offending, shall, for every such offence, forfeit five pounds. *f. 6.*

Killing male deer before 10th of June.

Such offence to be heard and determined by such justices as aforesaid, and the forfeiture for the same levied, divided, and paid to such persons, and in such manner as is before appointed for the offence of shooting deer, contrary to this act.

3. And by the act, *Ann. cap. 7. sect. 4.* If any person shall, except such as are qualified to kill the game, kill, or any way destroy, without the consent of the owners, any red-deer, or calf of a red-deer, such persons shall for the first offence, being thereof convicted, pay forty shillings, and for every other offence five pounds, which offences shall be determined before two justices of the peace.

Killing red-deer.

4. But by the act, *7 Geo. 2. cap. 8. sect. 2.* If any person shall unlawfully chase, kill, wound, maim, or take any red or fallow deer, in any inclosed ground where deer are usually kept, without the consent of the owner or person chiefly intrusted with the custody thereof, and shall be thereof convicted on an indictment for the same, at the assizes to be held for the county where such offence shall be committed, or at the assizes to be held for such county, where such offenders shall be taken and apprehended.

Deer in parks.

Or at the quarter-sessions of the county of *Dublin*, or of the county of the city of *Dublin*, in case such offence shall be committed, or the offender apprehended in the said county, or county of the city of *Dublin*, respectively.

Such offenders, shall, for every such offence, forfeit a sum not exceeding thirty pounds, nor under ten pounds for each deer so unlawfully chased, killed, wounded, or taken, to be ascertained and imposed by such court, where such offender shall be convicted, one moiety whereof to be for the use of them who shall give information and prosecute such offenders, and the other moiety for the owners of such deer; the same to be levied on the goods of such offenders, by order of the judges of assize, or such justices before whom the same shall be tried, and such offender shall be committed to the common gaol of such county, there to be kept in close custody for the term of twelve months.

5. If the persons so convicted shall not pay the said fine within three calendar months after such conviction, and shall not have effects sufficient on which the said fine can be levied, the judges before whom they shall be convicted, shall transport such offenders to some of his Majesty's plantations in *America*, for any time not exceeding seven years; and if such offenders so transported, shall return into this kingdom before the expiration of the term for

for which the said offender was transported, such offenders so returning, shall be guilty of felony without the benefit of clergy. *f. 3.*

Aiders, or
abettors, &c.

6. All persons who shall aid, assist, or employ any persons unlawfully to chase, kill, wound, maim, or take any deer as aforesaid, without the consent of the owner of such deer, being thereof convicted on an indictment in manner as aforesaid, shall incur the like penalties and forfeitures as are herein before inflicted on the persons who shall unlawfully chase, kill, wound, maim, or take any red or fallow deer as aforesaid. *f. 4.*

And in case any venison or deer-skin shall be found in the possession of any person, and there is good ground to suspect that the same has been stolen with the privity of the person in whose custody such venison or deer-skin is found, and if such person do not give a satisfactory account how he came by such venison or deer-skin, every such person shall without further evidence be convicted of the offence of unlawfully killing and taking deer within the intent of this act.

7. Provided that every prosecution on account of this act, be brought within six calendar months after any offence committed.

Unlawfully] Where a man kills deer in pursuance of a supposed right which he has, he is not within the intent of this, nor of the other acts against deer stealing. *L. Raym. 584.*

In any inclosed ground where deer are usually kept] *T. 1 An. Q. and Moore.* A conviction for killing deer was quashed, because it said only that he killed deer in a certain place where deer had been usually kept, and did not say inclosed. *L. Raym. 791.*

Aiding or assisting therein] On a conviction, the question was, whether he who lent dogs to another to hunt, was aiding and assisting therein, to wit, in the hunting: and by the opinion of three judges he was; but *Holt. Ch. J.* was of a contrary opinion, for this being a penal law, shall be construed strictly; and if so, then he who lent the dogs could not be assisting in the act of hunting, and so not within the words of the statute, *aiding and assisting therein*, tho' he might be assisting thereunto. *2 Salk. 542. 543.*

And shall be convicted thereof] There ought to be a summons in this, and in all other like cases, to warrant a conviction; and that ought to give a reasonable time to appear in: but if the defendant hath appeared, it cures the want of a summons. *1 Salk. 181, 383.*

H. 3 G. K. and Simpson. The defendant was convicted for deer stealing; and the conviction set forth, that he had been summoned to appear before the justices; but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this case, the justices should not have proceeded in the absence of the party, especially where it may end in a corporal punishment, as it may do here, for want of a distress. And at another day, on consideration, *Parker Ch. J.* delivered the resolution of the court: we are all of opinion, the offender may be convicted, without appearing. The statute is silent as to the method of proceeding, and the law
of

of *England*, it is true, in point of natural justice, always requires the party charged with any offence to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default: were it otherwise, every criminal might avoid conviction. The law being so, the magistrate is bound to give some opportunity to the party to appear; and if upon such notice, he neither comes, nor sends a sufficient excuse, the magistrate may proceed to judgment. If this was not to be allowed, the consequence would be, that the offender would escape unpunished, because he would never appear purposely to be convicted; and that would be to make the execution of the law depend on the will of the offender.

There was another order of conviction, whereby it appeared, that the defendant made an attorney to defend for him: and by the court; we think that it is certainly good; for the offender may intrust his defence with another, and the justices cannot enforce him to appear in person. And the orders were confirmed. *Str.* 44.

In 12 months after the offence] A conviction being returned on a certiorari, the objection was, that the conviction appeared to be a year after the day of the information; but it was held sufficient that the information be prosecuted within a year after the fact; for that is a good commencement of the suit, and it is from that the computation is made in all such cases. *1 Salk.* 383.

But by the black act hereafter mentioned, this prosecution may be commenced at any time within three years after the offence. *9 G. c.* 22. *f.* 13.

Oath of one credible witness] This must not be upon the single oath of the informer; and a conviction was quashed for that reason; divers convictions, as it is said, having been quashed for the same reason before. *L. Raym.* 1545. *Str.* 316.

In the case of *K.* against *Wilford* and *Savage*, *M.* 5 *G.* The defendants were severally convicted of deer stealing on this statute. Exception was taken, that the persons on whose testimonies the defendants were convicted, appeared to be of the same parish where the facts were committed, and so might be intitled to part of the penalty. But it was over-ruled by the court; because the justice hath averred them to be *credible* witnesses, and it doth not appear that they were of the poor of the parish. *Viner.* Deer stealing. A. 24. So in the case of *K.* and *Mitter*, *H.* 7 *G.* 2. The offence was committed in the parish of *Barking*. The witness was an inhabitant of the same parish. It was objected, that part of the penalty being given to the poor of that parish, the witness was interested, and therefore incompetent. It was answered, that if indeed the penalty had been given to the overseers of the poor of the parish, the objection might have had some weight in it, for then it would have been for the benefit of the rich as well as of the poor; but here it is given merely by way of bounty to the poor, and the rest of the inhabitants can have no benefit by it. And the court was of opinion, that the objection was fully answered; and the conviction was confirmed. *2 Barnardist.* 383.

Every such person so offending] A conviction of two persons was removed, wherein judgment was given, that each should forfeit 30*l.* It was objected, that there ought to be but one 30*l.* forfeited. But not allowed: For the words of the act are, that they shall *respectively forfeit* 30*l.* and this penalty is not in nature of a satisfaction to the party grieved, but a punishment on the offender; and crimes are several, tho' debts be joint. 1 Salk. 182. H. 10 An. 2. against King.

To be levied by distress] Sale of the goods is not mentioned here in the statute; yet nevertheless where the law gives a distress for a publick benefit, the officer may sell. 1 Salk. 379.

By warrant of such justice] Altho' the constable is not appointed to execute this warrant, nor is so much as named in the clause; yet he is bound to obey the warrant, and is indictable if he does not: but he need not return the warrant it self, for that is not required, and it may be necessary to keep it for his own justification; but he must either return that, or certify what he has done upon it. 1 Salk. 381.

One third to the informer, &c.] The penalty need not be distributed by the conviction; viz. 10*l.* to the informer, 10*l.* to the poor, and 10*l.* to the party grieved; for the judgment in such cases seldom mentions a distribution: it is enough to say, that he is convicted, and hath forfeited 30*l.* according to the statute. 1 Salk. 383.

For want of sufficient distress] If the justice finds there is nothing to distress, then he must make a record thereof, and make an adjudication for corporal punishment; but the offender is not to pay part, and suffer corporally for the residue. L. Raym. 546, 1195, 6.

H. 6 G. K. and Whitlock. The defendant was committed for want of distress; and the warrant set forth, that it had been certified to the justice by the constable, that there was not sufficient distress. It was objected that there ought to have been a warrant to levy, and a return to that, that there was no distress; it may be, the constable only told him so. But by the court, the warrant is well enough; for the word *certified* imports it to be in a legal manner. Str. 263.

Search warrants.

8. And by the same statute, 11 Ann. c. 7. It shall be lawful for any person by warrant of any two justices of the peace, to make search in all suspected houses and places other than of such persons who shall be qualified to kill the game, and if such person shall find any red-deer, calf flesh or skin of such red-deer or calf in the possession of any person, he shall bring such suspected person before such justices, where if such person shall not make proof to the satisfaction of the said justices, that the same was not taken killed, or gotten contrary to this act, or else shall not in some convenient time to be set by the said justices not exceeding six days, produce the party of whom he bought the same, or some other credible person to depose upon oath such sale thereof, such person shall be convicted by the said justices of the said offence. s. 5.

9. And upon such conviction shall forfeit the sums before-mentioned, to be levied by distress and sale of the offenders goods, by warrant under the hands and seals of such justices, before whom such offenders shall be convicted, rendering the overplus if any be, and for want of distress the offenders shall be committed to the house of correction, for any time not exceeding one month and not less than ten days, there to be whipped and kept to hard labour.

10. If it shall appear upon oath before such justices of the peace, that any persons have bought from any person, except persons qualified to kill the game, or the owners thereof, any red deer, calf or skin of a red deer, it shall be in the power of such justices to award the party who discovers the same the sum of twenty shillings, to be levied by distress and sale as aforesaid of the buyers goods. *f. 6.* Buying deer or skins.

II. Of hares.

It is to be remembered, that I have already, under the third part of this title, treated of those particulars, which are common to this with other species of the game, as to destroying the same by unqualified persons; I here take notice of such things as belong to hares only, and which for the most part seem generally to concern all persons, whether qualified or not.

1. No person of what estate, degree, or condition he be, shall trace, destroy, and kill any hare in the snow, every person offending shall for every such offence, being thereof convicted before one justice of the peace of the county where the same shall be committed or the offender apprehended, forfeit ten shillings, the one moiety thereof, to the use of the poor of the parish where such offence shall be committed, to be paid to the churchwardens of such parish for such use, the other moiety to them who shall inform and prosecute for the same, or otherwise shall be publicly whipt at the discretion of the justice before whom they shall be convicted. *10 Will. 3. c. 8. f. 8.* Tracing in the snow.

2. And by the *25 G. 2. c. 5. f. 3.* No person shall buy or cause to be bought, sell or expose to sale, any hare from the first day of *February* to the first day of *October*, under the penalty of five pounds for each hare so bought or sold, to be recovered as herein after is directed. Buying and selling hares.

3. All offences against this act shall be enquired into and determined either by the oath of one credible witness, or by the confession of the parties accused, before any one justice of the peace for the county where the offence shall be committed, or where the offender shall be found, and such justice is hereby empowered to issue his warrant for the distraining and sale of the goods of the party offending, in order to raise the penalty aforesaid, or if he shall be insolvent, for committing the party for the time before limited to the county gaol. *f. 4.*

4. All forfeitures to be incurred for any offence against this act, shall, when recovered, be paid to the informer or prosecutor. *f. 4.*

This act is continued, by stat. 1 G. 3. c. 17. Sect. 14. until the first day of May, 1769, and to the end of the then next session of parliament.

Hares bought
or sold.

Forfeit five
pounds.

Higlers, car-
riers, &c.

5 And by the 3 Geo. 3. cap. 23. Sect. 13. No person shall buy, or cause to be bought, sell or expose to sale, any hare from the first day of *February* to the first day of *October* in any year, under the penalty of five pounds for each hare so bought or sold, to be recovered as herein after directed.

6. Every higler, common carrier, or stage coachman, in whose possession any hare shall be found after the commencement of this act, at any time between the first day of *February* and the first day of *October* in each year, shall forfeit for every such hare, twenty shillings, to be recovered as herein after is directed. *f. 14.*

7. All offences against this act shall be enquired into and determined, either by the oath of one credible witness, or by the confession of the parties accused before any one justice of the peace for the county where the offence shall be committed, or where the offender shall be found, and such justice is hereby empowered to issue his warrant for the distraining and sale of the goods of the party offending, in order to raise the penalty aforesaid; or if he shall be insolvent, for committing the party for the time before limited to the county gaol. *f. 15.*

8. All forfeitures to be incurred for any offence to be committed against this act, shall, when recovered, be paid to the informer, or prosecutor. *f. 16.*

This act shall continue in force for two years, from the first day of May one thousand seven hundred and sixty four, and to the end of the then next session of parliament.

III. Of conies.

Trespassers
in warrens may
be resilted.

Hunting in a
warren by
night or dis-
guised.

1. If any warrener shall find any trespassers wandring within his liberty, intending to do damage therein, and that will not yield themselves after hue and cry made to stand unto the peace, but do flee, or defend themselves; altho' the warrener, or his assistant, do kill such offenders they shall not be troubled upon the same. *21 Ed. 1. st. 2.*

2. When information shall be made of unlawful hunting in a warren by night, or with painted faces, to any of the king's counsel, or to a justice of the peace, of any person suspected, he may make a warrant to bring such person before himself or any other of the said counsel or justices; and if such person shall conceal the said hunting, or any of his accomplices, it shall be felony; but if he confesseth, it shall be but trespass finable at the sessions. *1 H. 7. c. 7.*

V. Laws concerning the winged game in particular.

- I. Of hawks and hawking.
- II. Of swans.
- III. Of partridges and pheasants.
- IV. Of pigeons.
- V. Of wild ducks, wild geese, and other water fowl.

I. Of hawks and hawking.

1. **E**VERY person who findeth a faulcon, tercelet, laner, or laneret, or other hawk that is lost, shall presently bring the same to the sheriff; and the sheriff shall make proclamation in all the good towns in the county, that he hath such an hawk in his custody; and if he is challenged in four months, the owner shall have him again, paying the costs: if he is not challenged in four months, the sheriff shall have him, making gree to him that took him, if he be a simple man; but if he be a gentleman, and of estate to have the hawk, then the sheriff shall re-deliver to him the hawk, taking of him reasonable costs for the time that he had him in his custody.

34 *Ed. 3. c. 22.*

2. And if any man steal any hawk, and the same carry away, not doing the ordinance afore said; it shall be done of him as of a thief, that stealeth a horse or other things. 37 *Ed. 3. c. 19.* That is, he shall be guilty of felony, but shall have his clergy. 3 *Inst. 98.*

II. Of swans.

1. No person (other than the king's son) unless he have lands of freehold to the value of five marks a year, shall have any mark or game of swans; on pain of forfeiting the swans, half to the king, and half to any person (so qualified) who shall seize the same. 22 *Ed. 4. c. 6.*

2. It is felony to take any swans that be lawfully marked, tho' they be at large. *Dalt. c. 156.*

3. And as to swans unmarked; if they be domestical or tame, that is, kept in a moat, or in a pond near to a dwelling house, to steal such is also felony. *Dalt. cap. 156.*

So it seemeth of swans unmarked, so long as they keep within a man's manor, or within his private rivers; or if they happen to escape from thence, and be pursued and taken, and brought in again. *id.*

But if swans that are unmarked shall be abroad, and shall attain to their natural liberty, then the property, of them is lost; and so long, felony cannot be committed by taking them. *id.*

And

And yet such unmarked and wild swans the king's officers may seize (being abroad) for the king's use, by his prerogative. Also, the king may grant them, and by consequence another may prescribe to have them, within a certain precinct or place. *id.*

III. Of partridges and pheasants.

Partridges and pheasants are birds of warren, and the law seems peculiarly to protect them; as appears by what follows:

Destroying
eggs or nests.

1. By the act of 10 *Wil. 3. cap. 8. sect. 8.* No person shall destroy the eggs or nest of any partridge, pheasant, grouse, quail, duck, or other wild-fowl; nor shall any person, not qualified as aforesaid, shoot at, kill, take, or destroy any partridge, pheasant, grouse, or quail; on pain that every offender shall, for every such offence, being thereof convicted before one or more justices of the county where the same shall be committed, or the offender apprehended, forfeit ten shillings, one moiety to the poor of the parish where such offence shall be committed, to be paid to the church-wardens for such use, the other to him or them who shall inform and prosecute for the same as aforesaid, or otherwise shall be publickly whipt, at the discretion of the justice before whom he shall be convicted. *f. 8.*

Officers or soldiers killing
game.

2. And by the 6 *An. c. 14.* If any officer or soldier, without leave of the lord of the manor, under his hand and seal first had and obtained, shall take, kill, or destroy any hare, coney, partridge, pheasant, pigeon, or any other sort of fowl or poultry; and shall be thereof convicted upon the oath of one or more witnesses before any justice, who shall hear and determine the same, every officer so offending, and being so convicted, shall, for every such offence, forfeit five pounds, to be distributed by such justice amongst the poor of the place, where such offence shall be committed. *f. 10.*

And every officer commanding in chief upon the place, for every such offence committed by any soldier under his command, and of which such soldier shall be so convicted, shall forfeit ten shillings, to be paid and distributed in manner aforesaid.

Forfeiture of
commission.

3. And if upon such conviction, and demand made of such respective penalties by the constable or overseer of the poor of the parish where such offence shall be committed, such officer shall refuse, or for ten days neglect, to pay the said respective penalties, such officer shall forfeit his commission, and his commission is hereby declared null and void.

Killing game
out of season.

4. By the act 3 *Geo. 3. cap. 23.* No person shall take, kill, or destroy any partridge or quail, from the first of *February* to the first of *September* in each year, or any grouse from the first day of *February* to the first day of *August* in any year. *f. 11.*

Buying or selling
game.

5. Every person who shall take, kill, or destroy, or who shall sell or expose to sale, or who shall buy or cause to be bought, any partridge, quail, or grouse, within the respective times before-mentioned, shall for every partridge, quail, or grouse so taken, killed, or destroyed, sold, exposed to sale or bought, forfeit ten pounds for every offence, to be levied by distress and sale of the goods of the offender, and in case of insolvency, the party offending shall suffer imprisonment for three months. *f. 12.*

6. Every

6. Every higler, common carrier, or stage coachman, in whose possession Higlers, &c. carrying game. any patridge, or quail, shall be found after the first of *May*, one thousand seven hundred and sixty-four, at any time between the first of *February* and the first of *September* in each year, or in whose possession any grouse shall be found, after the first day of *May*, one thousand seven hundred and sixty-four, at any time between the first day of *February* and the first day of *August* in each year, shall forfeit for every such patridge, quail, and grouse, twenty shillings, to be recovered as herein after is directed. *f. 14.*

7. All offences against this act shall be enquired into and determined, Conviction of offenders. either by the oath of one credible witness, or by the confession of the parties accused, before any one justice of the peace for the county where the offence shall be committed, or where the offender shall be found, and such justice is hereby impowered to issue his warrant for the distraining and sale of the goods of the party offending, in order to raise the penalty aforesaid, or if he shall be insolvent, for committing the party for the time before limited to the county gaol. *f. 15.*

8. All forfeitures to be incurred for any offence to be committed against this act, shall, when recovered, be paid to the informer, or prosecutor. Forfeitures to the informer. *f. 16.*

This act shall continue in force for two years, from the first day of May, one thousand seven hundred and sixty-four, and to the end of the then next session of parliament.

IV. Of pigeons.

1. A lord of the manor may build a dove-cote upon his own land, parcel of the manor; but a tenant of a manor cannot do it without the lord's licence. *3 Salk. 248.* But any freeholder may build a dove-cote on his own ground. *Cro. El. 548. Cro. Ja. 382.* Who may erect a dove-cote.

2. And it hath been adjudged, that erecting of a dove-house is not a common nuisance, nor presentable in the leet. *Cro. Ja. 490, 1.* Dove-cote not a nuisance.

3. By the 10 *W. 3. c. 8.* No person shall shoot at, take, kill, or destroy any house dove or pigeon, other than such as shall be in or belonging unto the dove-house or pigeon-house of the person so shooting at, killing, or destroying the same; on pain that every offender shall, for every such offence, being thereof convict before one or more justices of the county where the same shall be committed, or the offender apprehended, forfeit ten shillings, one moiety to the poor of the parish where such offence shall be committed, to be paid to the church-wardens for such use, the other to him or them who shall inform and prosecute for the same as aforesaid, or otherwise shall be publicly whipt, at the discretion of the justice before whom he shall be convict. *f.* Penalty for killing pigeons.

4. And by the 6 *An. c. 14.* If any officer or soldier shall without leave of the respective lords of the manor under their hands and seals first obtained, take, kill, or destroy any pigeon, or any other sort of fowl or poultry; and shall be thereof convicted upon the oath of one credible witness, before any justice of the peace, who is hereby authorized to hear and determine the same; Officers or soldiers killing pigeons, &c.

same; every officer so offending, and being so convicted, shall forfeit five pounds, to be distributed by the said justices amongst the poor of the place where such offence shall be committed. *f. 10.*

Penalty of 10s. 5. And every officer commanding in chief upon the place, for every such offence committed by any soldier under his command, and of which such soldier shall be so convicted, shall forfeit ten shillings, to be paid and distributed in manner aforesaid.

Officer refusing payment. 6. And if upon such conviction and demand made of such penalties by the constable or overseer of the poor of the parish where such offence shall be committed, such officer shall by the space of ten days neglect to pay the said penalties, such officer shall forfeit and is hereby declared to have forfeited his commission, and his commission is hereby declared void.

Pigeons trespassing. 7. But if the pigeons come upon my land, and I kill them, the owner hath no remedy against me; tho' I may be liable to the statutes which make it penal to destroy them. *Cro. Ja. 492.*

Pigeons to go to the heir. 8. Doves in a dove-house, young and old, shall go to the heir, and not to the executor. *1 Inst. 8.*

V. Of wild ducks, wild geese, and other water fowl.

Destroying the nests of wild-fowl. 1. By the 9 *Will. 3. cap. 8. sect. 8.* No person shall destroy the eggs or nest of any duck or other wild fowl.

2. Every person offending, shall for every such offence, being thereof convict before one justice of the peace of the county where the same shall be committed or the offender apprehended, forfeit ten shillings, the one moiety thereof to the use of the poor of the parish where such offence shall be committed, to be paid to the church wardens of such parish for the use of the poor, the other moiety to them who shall inform and prosecute for the same, or otherwise shall be publickly whipt at the discretion of the justice, before whom they shall be convict.

Taking wild-fowl out of season. 3. And by the 11 *Geo. 2. cap. 12.* If any person between the first day of *July* and the first day of *October* in every year, shall by hays, tunnels, or other nets, drive or take any wild duck, teal, widgeon, or any other water-fowl, in boggy grounds, lakes, broad waters, or other places of resort for wild-fowl, in the moulting season, such persons who shall so offend and thereof be convicted before any justice of the peace for the county where such offence shall be committed, by the oath of one credible witness, shall for every water-fowl so taken, forfeit ten shillings, one moiety thereof to be paid to the informer, and the other moiety to the poor of the parish where such offence shall be committed, to be levied by distress and sale of the offenders goods, by warrant of the justice before whom the offender shall be convicted, rendering the overplus to the owner above the penalty and charge of distress, and for want of distress the offenders shall be publickly whipped on some market day, through some market town, within the county where such offence shall be committed. *f. 7.*

Nets to be seized.

4. And the justice before whom persons so offending shall be convicted, shall order such hays, nets, or tunnels, that were used in driving or taking the

the said wild-fowl, to be seized and immediately destroyed in the presence of such justice.

This act is now expired, but as it may probably be revived and further continued, it is therefore retained in its place.

VII. Laws for preserving the game of fish in particular.

I. The penalty of fishing in ponds and other private fisheries.

II. Qualification by estate or degree to kill fish.

I. The penalty of fishing in ponds and other private fisheries.

1. **A**NY man may erect a fish pond without licence, because it is a matter of profit, and for the increase of victuals. *2 Inst. 199.* Who may erect a fish pond.

2. If any trespassers in ponds be thereof attainted at the suit of the party great and large amends shall be awarded according to the trespass; and they shall have three years imprisonment, and after shall make fine at the king's pleasure (if they have whereof) and then shall find good surety, that after they shall not commit the like trespass: And if they have not whereof to make fine, after three years imprisonment, they shall find like surety; and if they cannot find like surety, they shall abjure the realm. And if none sue within the year and day, the king shall have the suit. *3 Ed. 1. c. 20.* Three years imprisonment and fine.

Note; Those are trespassers in ponds, who endeavour to take fish therein. *2 Inst. 200.*

3. And by the *12 Geo. 1. cap. 7. sect. 1.* It shall be lawful for any persons without other warrant than this act, to seize and bring before one justice of the peace of the county where the offences shall be committed, such persons as they shall find fishing with their faces blacked or disguised, and also such persons as shall be found in or near any rivers with their faces blacked or otherwise disguised, tho' such persons be not actually fishing at the time of such seizure. Disguised persons.

4. Which justice, upon conviction of such offenders by the oath of one credible witness, shall by his warrant levy by distress and sale of the goods of such offenders forty shillings, one moiety whereof shall be given to the informers, and the other moiety to the poor of the parish where such offence shall be committed. Penalty of 40s.

5. And in case no sufficient distresses can be had whereout to levy the said forty shillings, the said justices shall by warrant commit such persons to the house of correction or work-house for any time not exceeding thirty-one days, there to remain at hard labour, and to have due correction. Committal.

6. And by the *10 Will. 3. cap. 8.* Every person authorized by warrant of one justice of the peace, shall have power and is hereby required to enter into and search, in such manner and with such power as in case where goods are suspected to be stolen, the houses or other places belonging to such houses of suspected persons not qualified as aforesaid; and in case any fish or other game, Search-warrant.

game, shall be found, the offender shall be carried before some justice of the peace of the same county. *f. 13.*

Conviction.

7. And if such person do not give a good account how he came by such game, &c. as shall satisfy the said justice, that the same was not taken contrary to this act, or shall not in some convenient time to be set by the said justice, not exceeding six days, produce the party of whom he bought the same, or some other credible person, to depose upon oath such sale thereof, such person shall be convicted by the said justice of such offence.

Penalty.

8. And shall forfeit for every hare, partridge, pheasant, pigeon, fish, fowl or other game or venison, any sum not under five and not exceeding twenty shillings, to be ascertained by the said justice, one moiety thereof to be paid to the informer, and the other moiety to the poor of the parish where such offender shall live, the said forfeiture to be levied by distress and sale of the offenders goods, by warrant under the hand and seal of the justice, before whom the offender shall be convicted.

Committal.

And for want of distress, the offenders shall be committed to the house of correction, for any time not exceeding one month, and not less than ten days, there to be whipped and kept to hard labour.

Proof of innocence.

And in case any person charged with the said offence, shall not before the same justice give such evidence of his innocence as aforesaid, he shall be convicted thereof in the same manner as the persons first charged therewith, is hereby directed to be, and so from person to persons till the first offender shall be discovered.

Fish in ponds.

9. By the 11 *Geo. 2. cap. 12.* If any persons shall take or destroy any fish out of any pond or stew, wherein the same are kept, and wherein they have no property, without the licence and consent of the owners, and be thereof convicted upon the oath of one credible witness, before some justice of the peace of the county, &c. where the offence is committed, *they* shall forfeit for every offence a sum not exceeding ten pounds, nor less than five pounds, at the discretion of the justice, one half thereof to the informer, and the other half to the poor of the parish where the offence was committed, to be levied in such manner as the other penalties are by this act appointed to be levied; and for want of sufficient distress, the offenders shall be committed to the common gaol of the county, without bail or main-prize for three months. *f. 10.*

Penalty.

This act is now expired, but as it may probably be revived and further continued, it is therefore retained in its place.

II. Qualification by estate or degree to kill fish.

Unqualified persons.

1. By the 12 *Geo. 1. cap. 7.* No persons, except such as have an estate of freehold in their own or their wives right, of the clear value of forty pounds *per annum*, or a personal estate of the value of one thousand pounds, over and above all debts, and except such persons as shall be intitled to any fishery, or their farmers, and such persons as shall be lawfully employed in the same, shall, for themselves, or as servants to any persons who shall not be seized or possessed of a real or personal estate to the value aforesaid, or intitled

led to any fishery as aforesaid, make, have, or keep any gaffs, spears, lyfters, loops, nets, or any other engines or instruments commonly made use of to take or kill salmon or salmon-fry, altho' no proof can be made that they did apply any of them to such uses. *s. 2.*

2. On pain that all and every such engine and instrument so kept contrary to this act, as also all fish found with them, shall be seized or taken away by any justice of the peace of the respective counties where the same shall be kept or found, or by persons authorized thereunto by warrant of such justice, and may be detained by them to their own use. Fishing-tackle forfeited.

3. And every person so having and keeping any such nets or other engine or instrument contrary hereunto, and being thereof convicted upon his appearance or default after summons, before one justice of the peace of the county or place where such offence shall be committed, on the oath of one credible witness, shall, for every such offence, forfeit forty shillings, to be levied by warrant of such justice before whom such offender shall be convicted, by distress and sale of the goods of such offender, the one moiety thereof to the informer and the other moiety to be disposed of to the use of the poor of the parish where such offences shall be committed. Penalty of 40s.

4. And in case no sufficient distress can be had whereout to levy the said forty shillings, the said justice shall by warrant commit such persons to the common gaol of the county or place where such offence shall be committed, there to remain for any time not exceeding thirty-one days, unless such offender shall sooner pay the penalty so forfeited, and upon such payment to be discharged. Committal.

A. Appointment of a game-keeper.

I A. L. esquire, lord of the manor of——do hereby nominate, authorise, and appoint A. G. of P. in the county of——yeoman, to be my game-keeper of and within my said manor of——in the county aforesaid, with full power, licence, and authority to kill any hare, pheasant, partridge, or any other game whatsoever, in and upon my said manor of——for my sole use, and immediate benefit; and also to take and seize all such guns, bows, greyhounds, setting dogs, lurchers, or other dogs to kill hares or conies, ferrets, tramels, low-bells, hays, or other nets, harepipes, snares, or other engines for the taking and killing of conies, hares, pheasants, partridges, or other game, as within the precincts of my said manor of——shall be used by any person or persons, who by law are prohibited to keep or use the same. Given under my hand and seal, this——day of——in the——year, &c.

B. Warrant to search for dogs and engines.

County of Dublin. { To——

WHEREAS complaint hath been made unto me J. P. esquire, one of his Majesty's justices of the peace in and for the said county, upon the oath of A. I. of——in the said county, yeoman, that he the said A. I. hath good ground

Game.

ground to suspect and doth suspect that A. O. of ——— aforesaid in the county aforesaid, yeoman, being a person in no respect qualified by the laws of this realm so to do, hath and keepeth in his custody a greyhound [gun, net, &c.] to kill and destroy the game: these are therefore to command you in his majesty's name to enter into, and search in the day time, the houses, outhouses, and other places of him the said A. O. at ——— aforesaid, and if you there find any greyhound, &c. that you seize and keep the same for the use of A. L. esquire, lord of the manor of ——— in which manor the said houses, outhouses, and other places, are situate and do lie, or otherwise that you cut in pieces or destroy the same. Given under my hand and seal the ——— day of ——— in the ——— year, &c.

C. Warrant against a person for keeping dogs and engines.

Dublin. } To——

WHEREAS complaint hath this day been made before me J. P. esquire, one of his majesty's justices of the peace in and for the county of ——— aforesaid, upon the oath of A. I. of ——— in the said county, yeoman, that A. O. of the parish of ——— in the said county, shoemaker, doth keep [or use] a greyhound, &c. to kill and destroy the game, he the said A. O. not being qualified by the laws of this realm so to do, contrary to the statutes in such case made and provided: these are therefore in his majesty's name to command you, that you do forthwith upon sight hereof apprehend the said A. O. and bring him before me to answer the premisses, and to be further dealt with according to law. Given under my hand and seal the ——— day of ——— in the ——— year of the reign of——.

D. Conviction of keeping dogs and engines.

Dublin. **B**E it remembred, that on the ——— day of ——— in the ——— year of the reign of ——— of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at ——— in the county aforesaid, A. I. of ——— cometh before me J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and giveth me the said justice to understand and be informed, that on the ——— day of ——— in the ——— year aforesaid, at the parish of ——— in the county aforesaid, one A. O. of the parish aforesaid in the county aforesaid, shoemaker, not then having lands and tenements, nor any other estate of inheritance, in his own or his wife's right, of the clear yearly value of 40l. per annum, nor a personal estate of the value of one thousand pounds, over and above all debts, nor being the owner nor keeper of any forest, park, chase, or warren, nor gamekeeper to any lord or lady of a manor, did keep and use a certain dog, called a greyhound, to kill and destroy the
game,

game, against the form of the statute in that case made and provided: and afterwards upon the aforesaid day, and in the year first abovementioned, be the said A. O. being brought before me by my warrant for that purpose, is asked by me the said justice, if he can say any thing for himself, why he the said A. O. should not be convicted of the premisses above charged upon him in form aforesaid; who pleadeth that he is not guilty of the said offence: nevertheless on the day aforesaid, in the year aforesaid, at ——— aforesaid, in the county aforesaid, one credible witness, to wit, A. W. of ——— yeoman, cometh before me the aforesaid justice, and before me the same justice upon his oath on the holy gospel to him then and there by me the aforesaid justice administered, deposeth, sweareth, and upon his oath aforesaid affirmeth, and saith, that the aforesaid A. O. on the ——— day of ——— aforesaid, in the year aforesaid, at the parish of ——— aforesaid, in the county aforesaid, not then having lands and tenements, nor any other estate of inheritance, in his own or his wife's right, of the clear yearly value of 40 l. per annum, nor personal estate of the value of one thousand pounds, over and above all debts, nor being the owner nor keeper of any forest, park, chase, or warren nor gamekeeper to any lord or lady of a manor, did keep and use a certain dog called a greyhound, to kill and destroy the game: and thereupon the aforesaid A. O. the day and year aforesaid, at — aforesaid, in the county aforesaid, before me the same justice, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid is convicted: and for his offence aforesaid hath forfeited the sum of 5 l. of lawful money of Great Britain, to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice to this present record of the conviction aforesaid, have set my hand and seal at ——— aforesaid, in the county aforesaid, the day and year first abovewritten.

E Warrant to distrain 5 l. for keeping dogs or engines.

Dublin. } To ———

WHEREAS A. O. of ——— in the said county shoemaker, is this day convicted before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of A. I. a credible witness, for that he the said A. O. being a person not qualified by the laws of this realm so to do, on the ——— day of ——— in the ——— year of the reign of ——— did keep and use in the parish of ——— aforesaid, in the county aforesaid, a certain dog called a greyhound, to kill and destroy the game, by virtue whereof he the said A. O. hath forfeited the sum of 5 l. to be distributed as herein after is mentioned: these are therefore in his said majesty's name, to command you to levy the said sum by distress of the goods of him the said A. O. and if within the space of [four] days next after such distress by you taken, the said sum, together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained, and out of the money arising by such sale, that you do pay one half of the said sum of 5 l. to A. I. of ——— in the said county, yeoman,

Game.

man, who informed me of the said offence, and the other half of the said sum of 5 l. to the churchwardens of the parish of ———— aforesaid, where the said offence was committed, for the use of the poor of the said parish; returning the overplus on demand unto him the said A. O. the reasonable charges of taking, keeping, and selling the said distress, being first deducted. And if sufficient distress cannot be found of the goods of the said A. O. whereon to levy the said sum of 5 l. that then you certify the same to me, together with the return of this precept. Given under my hand and seal the ——— day of ——— in the ——— year of ———.

F. Commitment for want of distress, for keeping dogs and engines.

Dublin. { To the constable of ———— in the said county, and to the
keeper of the house of correction at ———— in the said
county.

WHEREAS A. O. of ———— in the said county, shoemaker, was on the ——— day of ——— in the ——— year of ——— convicted before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of A. W. a credible witness, for that he the said A. O. not being a person by the laws of this realm qualified so to do, on the ——— day of ——— in the year aforesaid, did keep and use in the parish of ——— aforesaid, in the county aforesaid, a certain dog called a greyhound, to kill and destroy the game, by virtue whereof he the said A. O. hath forfeited the sum of 5 l. of lawful money of Great Britain; and whereas on the said ——— day of ——— in the year aforesaid, I did issue my warrant to the constable of ——— to levy the said sum of 5 l. by distress and sale of the goods of him the said A. O. and to distribute the same according as is directed by the statute in that behalf made; and whereas it duly appears to me, as well on the oath of the said constable, as otherwise, that he the said constable hath used his best endeavours to levy the said sum on the goods of the said A. O. as aforesaid, but that no sufficient distress can be had whereon to levy the same: these are therefore to command you the said constable of ——— aforesaid, to apprehend the body of the said A. O. and him safely to convey to the house of correction at ——— in the said county, and there deliver him to the said keeper thereof, together with this precept. And I do hereby command you, the said keeper of the said house of correction, to receive into your custody in the said house of correction the said A. O. and him there safely to keep for the space of three months: and for so doing this shall be your sufficient warrant. Given under my hand and seal the ——— day of ——— in the ——— year, &c.

G. Warrant against a higler having game in possession.

Dublin. } To the constable of—

WHEREAS A. I. of — bath this day made oath before me J. P. esquire, one of his majesty's justice of the peace in and for the said county, that on the — day of — now last past, he the said A. I. did see in the possession of A. O. of — in the parish of — in the county aforesaid, innkeeper at — aforesaid, in the parish and county aforesaid, in the house of him the said A. O. then and there one hare [or, did see him offer to sell one hare, or as the case shall be] be the said A. O. being no way qualified by the laws of this realm, to have the said hare in his custody or possession; against the form of the statute in that case made and provided: these are therefore to command you, to bring the said A. O. before me or some other of his Majesty's justices of the peace for the said county, to answer the premisses, and to be further dealt withal according to law. Given under my hand and seal, the — day of — in the — year, &c.

H. Warrant to levy 20s. on the goods of a higler convicted of having game in his custody.

Dublin. } To the constable of—

WHEREAS A. O. of — in the parish of — in the county aforesaid, higler, is on this present — day of — in the — year of the reign of — duly convicted before me J. P. esquire, one of his Majesty's justices of the peace in and for the said county, upon the oath of A. W. a credible witness, for that he the said A. O. on the — day of — in the — year of — at the parish of — aforesaid, in the county aforesaid, had in his custody and possession (between the first day of February, and the first day of October) one hare, he the said A. O. being no way qualified by the laws of this realm to have the said hare in his custody or possession, against the form of the statute in that case made, by reason whereof, he the said A. O. hath forfeited the sum of 20s. These are therefore to require you to levy the said sum of 20s. by distress of the goods of him the said A. O. and if within the space of [five] days next after such distress by you taken, the said sum of 20s. together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained as aforesaid, and out of the money arising by such sale, that you do pay one half of the said sum of 20s. to A. I. of — yeoman, who informed me of the said offence, and the other half to the poor of the parish of — aforesaid, within which parish the said offence was committed; returning to him the said A. O. the over-
plus

Game.

plus on demand, the reasonable charges of taking, keeping, and selling the said distress, being first deducted. And if sufficient distress cannot be had of the goods of the said A. O. that you certify the same to me together with the return of this precept. Given under my hand and seal the——day of——in the year of——.

I. Commitment on the same for want of distress.

Dublin. { To the constable of——in the said county, and to the
keeper of the house of correction at——in the said
county.

WHEREAS A. O. of——in the said county, bigler, was on the——day of——duly convicted before me J. P. esquire, one of his Majesty's justices of the peace in and for the said county, upon the oath of A. W. of——a credible witness, for that he the said A. O. on the——day of——in the——year of——at the parish of——aforesaid, in the county aforesaid, had in his custody and possession one hare, he the said A. O. being no way qualified by the laws of this realm to have the said hare in his custody or possession, against the form of the statute in that case made, by reason whereof he the said A. O. hath forfeited the sum of 20s. And whereas on the said——day of——in the year aforesaid, I did issue my warrant to the constable of——to levy the said sum of 20s. by distress and sale of the goods of him the said A. O. and to distribute the same according as is directed by the said statute: And whereas it duly appears to me, as well on the oath of the said constable of——as otherwise that he the said constable of——hath used his best endeavours to levy the said sum on the goods of the said A. O. as aforesaid, but that no sufficient distress can be found whereon to levy the same; These are therefore to require you the constable of——aforesaid, to carry the said A. O. to the said house of correction at——aforesaid, and deliver him to the said keeper thereof, together with this precept. And you the said keeper are hereby commanded to receive into your custody in the said house of correction him the said A. O. and him there safely to keep for the space of three months, without bail or mainprize; and for your so doing this shall be your sufficient warrant. Given under my hand and seal the——day of——.

K. Conviction for killing deer, from Tremaine's entries, 328, 329.

Cumber-
land. **B**E it remembred, that on the third day of September, in the year of the reign of our lord Charles the second now king of &c. the thirty-second, one Benjamin Granger of——gentleman, cometh before me John Aglionby, esquire, one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county of C. at G. in the same county, and giveth me to understand and be informed, that one James Dobson, late of——J. B. late of——and L. M. late of——on the 25th day of August, in the year of the reign of our said lord the now king, the 32d aforesaid, in a certain park then of the most noble Henry duke of Norfolk, called Gray-

Graystock park, in the parish of Graystock, in the said county, then and long before and yet being ground inclosed, wherein deer then were and long before had been usually kept, unlawfully hunted, and a certain fallow deer of the said duke then in the same park killed, took, and carried away, without the consent of the said duke then owner of the said park, or of Andrew Huddleston, esquire, then being chiefly intrusted with the custody of the same park, against the form of the statute in such case made and provided: And afterwards, to wit, on the aforesaid third day of September in the 32d year aforesaid, two credible witnesses, that is to say, J. H. of——— and T. B. of——— came before me the said justice assigned, &c. at G. aforesaid, and before me the said justice assigned, &c. upon their oath on the holy gospel of God to them then and there by me the aforesaid justice assigned, &c. by the authority of the statute aforesaid administered and given, do depose, swear, and say, and each of them doth depose, swear, and say, upon their oath aforesaid, that the aforesaid J. D. J. B. and L. M. on the aforesaid 25th day of August, in the 32d year aforesaid, in the aforesaid park and ground inclosed, of the aforesaid duke of Norfolk, in the parish of Graystock aforesaid, unlawfully hunted, and the aforesaid fallow deer of him the said duke, then in the said park and ground inclosed, took, killed, and carried away, without the consent of the same duke then owner of the said park and ground inclosed, or of the aforesaid A. H. esquire, then with the custody of the same park and ground inclosed as is aforesaid chiefly intrusted. And thereupon they the aforesaid J. D. J. B. and L. M. on the said 3d day of September, in the 32d year aforesaid, before me the said justice assigned, &c. by the oath of two credible witnesses aforesaid, according to the form of the statute aforesaid, are, and every of them is, convicted. And for the offence aforesaid, every of them the aforesaid J. D. J. B. and L. M. according to the form of the statute aforesaid, hath severally forfeited the sum of 30l. one third part thereof to the aforesaid R. G. the informer in this behalf as is aforesaid, another third part thereof to the use of the poor of the said parish of G. within which parish the offence aforesaid was committed, and the other third part thereof to the duke aforesaid, owner of the deer aforesaid. In witness whereof I the aforesaid justice to this present record of the conviction as aforesaid, have set my hand and seal, at G. aforesaid, on the day and year first above-mentioned.

John Aglionby.

L. Warrant of distress for hunting and killing deer.

Dublin. { To———

WHEREAS A. O. of———yeoman, is this day duly convicted before me J. P. esquire, one of his Majesty's justices assigned to keep the peace in the said county, and also to hear and determine divers trespasses and other misdemeanors in the said county committed, by the oath of A. W. of———yeoman, a credible witness, for that he the said A. O. on the———day of———in the———year of———in a certain park then of Sir P. M. baronet, in the parish of———in the said county, then and long before and yet being ground inclosed, wherein deer then were and long before had been usually kept, unlawfully did hunt, and a certain fallow deer of the said Sir P. M. baronet, then in

Game.

the same park did kill, take, and carry away, without the consent of the said Sir P. M. baronet, then owner of the said park, or of any other person then chiefly intrusted with the custody of the same park, against the form of the statute in such case made and provided; by reason whereof he the said A. O. hath forfeited the sum of 30l. of lawful money of Great Britain, to be distributed as herein after is mentioned.

These are therefore in his said Majesty's name to command you to levy the said sum by distress of the goods and chattels of him the said A. O. And if within the space of [six] days next after such distress by you taken, the said sum of 30l. together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained as aforesaid; and out of the money arising by such sale, that you do pay one third part of the said sum of 30l. to A. I. of——in the said county, yeoman, who informed me of the said offence; and one third part unto the church wardens or overseers of the poor of the said parish of——for the use of the poor of the said parish, and the other third part to the said——owner of the said deer; returning to him the said A. O. the overplus upon demand, the reasonable charges of taking, keeping, and selling the said distress being first deducted. And if sufficient distress cannot be had or found, by and on which the said sum of 30l. may be levied, you are hereby required to certify the same to me, within two days after the date of this present warrant. Given under my hand and seal, at——in the county aforesaid, the——day of——in the——year of the reign of——.

M. Commitment for want of distress, for hunting and killing deer.

Dublin. { To the constable of——in the said county, and to the keeper of the common gaol at——in the said county, and to the chief officer of the market town of——in the said county, and to every of them.

WHEREAS A. O. of——labourer, was on the——day of——duly convicted before me J. P. esquire, one of his Majesty's justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, by the oath of A. W. of——yeoman, a credible witness, for that he the said A. O. on the——day of——in the——year——in a certain park then of——esquire, in the parish of——in the said county, then and long before and yet being ground inclosed wherein deer then were and long before had been usually kept, unlawfully did hunt, and a certain fallow deer of the said——esquire, then in the same park did kill, take, and carry away, without the consent of the said——then owner of the said park, or of any other person then chiefly intrusted with the custody of the same park, against the form of the statute in such case made and provided; by reason whereof he the said A. O. hath forfeited the sum of 30l. And whereas on the said——day of——in the year aforesaid, I did issue my warrant to the constable of——to levy the said sum of 30l. by distress of the goods and chattels of him

him the said A. O. and to pay over the said sum of 30l. according as is directed by the statute aforesaid: And whereas it duly appears to me, as well on the oath of the said constable of——as otherwise, that he the said constable of——bath used his best endeavours to levy the said sum of 30l. on the goods and chattels of the said A. O. as aforesaid, and that no sufficient distress can be found whereon to levy the same: Therefore in pursuance of the statute aforesaid, I do hereby command you the said constable of——him the said A. O. to apprehend and safely to convey to the said common gaol at——aforesaid, in the county aforesaid, and him to deliver to the keeper thereof aforesaid, together with this precept: And I do hereby command you the said keeper of the gaol aforesaid, to receive into your custody in the said gaol him the said A. O. and him there safely to keep for the space of one whole year; saving that within the said year you deliver him the said A. O. to the chief officer of——being the next market town next adjoining to the place where the said offence was committed, or to his under officer or officers, together with this precept, who are hereby respectively required to set the said A. O. in the pillory in the said market town, by the space of one hour on some market day. And hereof fail not as you will respectively answer the same at your perils. Given under my hand and seal, at——in the said county, the——day of——in the year——.

N. Warrant to search for venison or skins.

Dublin. { To the constable of——

WHEREAS A. I. of——in the said county, yeoman, hath this day made oath before me J. P. esquire, one of his Majesty's justices of the peace, in and for the said county, that divers fallow deer have of late been unlawfully killed in, and taken and carried away from the park and ground inclosed of——at——in the said county, and that he the said A. I. hath just cause to suspect, and doth suspect, that venison or the skins of deer, or toyls whereby to take and kill deer, are concealed in the houses, outhouses, or other places belonging to the said houses of A. O. of——yeoman, and B. O. of——yeoman, at——aforesaid in the county aforesaid: These are therefore in his said Majesty's name, and by virtue of the statute in that case made and provided, to require you that you do forthwith upon sight hereof, enter into and search the said houses, outhouses, and other places belonging to the said houses, of them the said A. O. and B. O. at——aforesaid; and if on such search you shall there find any venison, or skin of any deer, or toyls aforesaid, that you do apprehend the person or persons, in whose houses, outhouses, or other places aforesaid, such venison, skin, or toyls shall be found, and him or them so apprehended do carry before some of his said Majesty's justices of the peace in and for the said county, to be examined concerning the premisses, and further dealt withal according to law. Given under my hand and seal the——day of——in the year——.

Gaming not an
offence at com-
mon law.

Gaming house
a nuisance.

Losing 10*l.* at
a time.

Answer upon
oath.

Playing upon
credit,

Securities void.

Securities to be
void.

1. **M**R. Dalton says, that playing at cards and dice, and the like, are not prohibited by the common law; neither are they *mala in se*, of their own nature, but only prohibited by statute. *Dalt. c. 46.*

2. But it hath been said, that all common gaming houses are nuisances in the eye of the law, as being great temptations to idleness, and apt to draw together numbers of disorderly persons. *1 Haw. 198.*

3. By the 11 *Ann. cap. 5.* Any person who shall at any time or sitting, by playing at cards, dice, tables, or other game whatsoever, or by betting on the sides of such as do play, lose to any one or more persons so playing or betting, in the whole the sum or value of 10*l.* and shall pay or deliver the same, or any part thereof; the person so losing and paying or delivering the same, shall be at liberty in three months to sue for and recover the same with costs, in any court of record: and if he shall not sue in three months, it shall be lawful for any person to sue for and recover the same and treble value, with costs; half to such person who shall sue, and half to the poor. *f. 2.*

And every person who shall so be liable to be sued for the same, shall be obliged and compellable to answer on oath such bill as shall be preferred against him, for discovering the sum of money or other thing so won. *f. 3.*

Or other game whatsoever] *M. 15 G. 2. Goodburn and Marley.* It was determined, that *horse races* are within these general words. *Str. 1159.*

4. If any person shall play at cards, dice, tables, tennis, bowls, kittles, shovelboard, or any other pastime or game whatsoever (other than for ready money) or bet on the sides of such as shall play, and shall lose any sum or other thing, exceeding 100*l.* at any one time or meeting, upon ticket, or credit, or otherwise, and shall not pay down the same at the time when he shall lose the same; in such case he shall not be bound to make it good, but the contract for the same, and for every part thereof, and all assurances and securities for the same shall be void; and the winner shall forfeit treble value of all such sums as he shall so win above 100*l.* half to the king, and half to him that shall sue in one year in the courts at *Dublin*, with treble costs. *10 Will 3. cap. 11.*

In the case of *Humphries and Rigby, M. 1698.* A bill was brought, to be relieved against a bond for money won at all fours. The plaintiff was a distiller, and the defendant a tapster at a bowling green. And it appearing that the defendant laid the cards, and turned up the knave of clubs, which was Jack, several times together; and being an unreasonable sum for such persons to venture; the plaintiff was relieved, and the bond ordered to be delivered up, altho' this case was not within the statute, the bond being for less than 100*l.* For equity always relieved before the statute, where any fraud appeared. *2 Abr. Eq. Cas. 184.*

5. And all notes, bills, bonds, judgments, mortgages, or other securities, where the whole or any part of the consideration shall be for money or any other valuable thing, won by playing at cards, dice, tables, tennis, bowls, or other game whatsoever; or by betting on the sides of such as do game; or for the reimbursing or repaying any money knowingly lent or advanced, at the time and place of such play, to any person so gaming or betting, or that shall (during such play) so play or bett,—shall be void: And where

where such securities shall be of lands, or such as incumber or affect the same; they shall enure and be to the sole use and benefit of, and devolve upon such person as might have such lands, in case the said grantor, or person so incumbering the same, had been dead; and all conveyances to hinder them from devolving on such person, shall be void. 11 *Ann. cap. 5. sect. 1.*

Securities] *H. 19 G. 2. Barjeau and Walmsley.* The plaintiff and defendant gamed together, at tossing up for five guineas at a time. And the plaintiff having won all the defendants ready money lent him ten guineas at a time, and won it, till the defendant had borrowed 120 guineas. In an action for money lent, it was insisted for the defendant, that by the 9 *An. c. 14.* the plaintiff could maintain no action; for by that act, all *securities* for money lent to game with shall be void; and the borrowing on an agreement to pay, is a *security*. But *Lee Ch. J.* held, that this was not a case within the act, for there is not the word *contract*, as in the statute of usury; and the word *securities*, as it stands in this act, must mean lasting liens upon the estate. The parliament might think there would be no great harm in a parol contract, where the credit was not like to run very high; and therefore confined the act to written securities. Wherefore the plaintiff obtained a verdict for 126*l.* *Stra. 1249.*

In the case of *Rawdon and Shadwell, Apr. 23. 1755.* A bill was brought by the plaintiff for an injunction, and that the defendant might deliver up the plaintiff's bond for 1150*l.* for money lost at play, and might refund a sum of 150*l.* paid by the plaintiff in part of the said bond. It appeared, that the plaintiff was a lieutenant, and the defendant a captain in Cotterel's regiment; and about 14 years ago, being quartered at Leeds in Yorkshire, the defendant won of the plaintiff in one evening the sum of 1150*l.* The plaintiff was under age; and, being so, gave a bond for the money to the defendant; and afterwards, when of age, paid 150*l.* in part. It was insisted for the plaintiff, that the securities by the statute of the 16 *C. 2.* were totally void, and ought to be delivered up; that the property of an infant in money lost at play, is not altered, and therefore trover would lie; and the statute of the 9 *An.* was mentioned, and a case in 2 *Mod. 91.* For the defendant, it was urged, that the plaintiff on the same evening won of another in the same company, to wit, the surgeon of the regiment, a larger sum than the 1150*l.* which has been paid by him. That fair gaming is not *malum in se.* It is only prohibited *sub modo.* That the case cited was of money lost with false dice, which the court takes cognizance of as a cheat. That the statute of *An.* gives the court jurisdiction only as to a discovery. That as to the 150*l.* it was paid after he came of age; and if the court should order the defendant to refund at the distance of 14 years, it would occasion an infinite number of applications. That the statute of 16 *C. 2.* gives no remedy to recover money already paid. That there has been too long an acquiescence. That money paid, even in cases of bribery and corruption, cannot be recovered at law. That the statute of *An.* has directed an action within three months, for money lost and paid at play.—The lord chancellor said, the decree he should make was not founded on any imputation on the character of the defendant, who had put in a very candid answer. But this is a breach of the law, from a false principle of honour. And

And he was of opinion, that the plaintiff was intitled to the whole relief prayed; that a party may come into this court to have a void security delivered up; that refunding the money is of course, as the statute has made the security void to all intents and purposes.

Justices may
summon game-
sters,

Binding over.

Forfeiture of
recognizance.

Cheating.

6. And any two justices may cause to come, or to be brought before them, every person whom they shall have just cause to suspect to have no visible estate, profession, or calling, to maintain themselves by, but do for the most part support themselves by gaming; and if such person shall not make it appear to the said justices, that the principal part of his expences is not maintained by gaming, they shall require of him sufficient securities for his good behaviour for 12 months, and in default of his finding such securities, shall commit him to the common goal, until he shall find such securities as aforesaid. 11 *Ann. cap. 5. sect. 6.*

And if he shall, during the time for which he shall be bound, at any one time or sitting, play or bet for any sums or other thing exceeding in the whole the value of 20*s.* such playing shall be deemed a forfeiture of the recognizance. *f. 7.*

7. If any person shall by any fraud, unlawful device, or other ill practice in playing at cards, dice, tables, tennis, bowls, kittles, shovelboard; or by cockfightings, horse races, dog matches, foot races, or other pastimes or games; or by bearing a share in the stakes; or by betting on the sides of such as shall play, act, ride, or run as aforesaid, — win any sum or other valuable thing; he shall forfeit treble the value, half to the king, and half to the party grieved (if he shall sue in six months), otherwise to any person who shall sue in one year next after the said six months, in any of the courts at *Dublin*, with treble costs. 10 *Will. 3. cap. 11. f. 2.*

And by 11 *Ann. cap. 5.* If any person shall by any fraud or shift, connivance, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at cards, dice, tables, tennis, bowls, or any the games aforesaid, or bearing a share in the stakes, or betting on the sides of such as do play, win any sum of money or other valuable thing, and shall be convicted thereof upon indictment or information; he shall forfeit five times the value of such money or other thing so won, and shall be deemed infamous and suffer such corporal punishment as in cases of wilful perjury; and such penalty to be recovered by such person as shall sue for the same, by such action as aforesaid. *f. 5.*

T. 9 G. 2. K. and Luckup. The defendant was convicted on an information upon this act, which says, that he shall forfeit five times the value, to be recovered by a common informer, upon conviction. And it was moved, that a fine should be set upon the defendant, if he refused to speak with the prosecutor. But by the court, All the judgment that we can give is, *that he is convicted*; and a new action must be brought upon that judgment for the forfeiture, which was thought sufficient to deter the offenders. In the case of recusancy, there is no other judgment. And the defendant was discharged, without any fine or costs. *Str. 1048.*

Quarelling.

8. And for the preventing such quarrels as may happen on the account of gaming; if any person shall assault and beat, or challenge to fight, any other person whatsoever, on account of any money won by gaming, playing, or betting, at any the games aforesaid, he shall, on conviction thereof by indictment or information, forfeit to the king all his goods and chattels and personal

personal estate whatsoever, and shall also suffer imprisonment without bail or mainprife, in the common goal of the county where the conviction shall be had, during the term of two years. 11 *Ann. cap. 5. sect. 8.*

9. It is generally provided by the several statutes, that nothing therein shall hinder any person from playing at any the games aforesaid, within any of the king's royal palaces, where he shall then reside. Royal Palaces excepted.

10. By the 6 *Ann. cap. 17.* All lotteries are declared to be publick nuisances; and all grants, patents, and licences, for such lotteries, to be against law. Lottery a nuisance.

11. No person shall expose to be played, drawn, or thrown at, or shall play, draw, or throw at any lottery, either by dice, lots, cards, balls, or any other numbers or figures, or any other way whatsoever. Keeping or playing at a lottery.

12. And no person shall publickly exercise, keep open, shew or expose any gaming-table, device or place, where any persons shall play at dice or cards for money or goods, or shall bet or lay any wagers on the sides or hands of such who play only for pastime. Gaming tables.

13. Every person *who shall so offend* shall forfeit such sum of money for every such offence, as any two justices of the peace or chief magistrate of any city or town corporate where the offence shall be committed, shall adjudge reasonable upon proof of the matter before him, upon the oaths of two credible witnesses so as such sum for any such offence doth not exceed forty shillings. Penalty.

14. Which justices of the peace or chief magistrate is required to summon the party complained of, and to hear and determine such offences, and by warrant to cause the said money to be levied by distress and sale of the goods of the persons so offending, a moiety of the said penalty to be to the use of the party who shall inform, and the other moiety to the use of the poor of the parish where such offence shall be committed. Warrant of distress.

15. And if no sufficient distress can be found, the parties offending shall by order of the said justices or chief magistrate be publickly whipt on some market day, in the open market of the said city, town-corporate, or next chief town of the county where the offence shall be committed. Committal.

16. Provided, that every information concerning offences mentioned in this act, be within ten days after the offence committed, and the prosecution and warrant for levying such penalties as aforesaid, be had thereon within one month after such warrant had. Information in one month.

17. And by the 11 *Ann. cap. 6. sect. 1.* All lotteries shall be deemed publick nuisances, and no person shall publickly or privately exercise, keep open, shew or expose to be played at, drawn at or thrown at, or shew, draw, play or throw at, any such lottery or any other lottery, either by dice, lots, cards, balls or any other numbers or figures or any other way whatsoever. Lotteries a nuisance.

18. Every person that shall exercise, expose, open or shew to be played, thrown or drawn at, any such lottery, play or device, or other lottery, shall forfeit for every such offence one hundred pounds, to be recovered by information or action at law in any of the four courts at *Dublin*, wherein no essoin, &c. shall be allowed, one third part thereof to the use of her Majesty, one other third part thereof to the use of the poor of the parish where such offence shall be committed, and the other third part thereof together with double costs to the party that shall inform and sue for the same, Penalties, for setting up, &c.

same, and the parties so offending shall likewise be prosecuted as common cheats according to the statutes in that case provided. *f. 2.*

Penalty for playing, &c.

19. Every person that shall play, throw or draw at, any lottery, play or device, shall forfeit for every such offence ten pounds, to be recovered by information or action in any of *the* four courts at *Dublin*, one third part thereof to the use of her Majesty, one other third part thereof to the use of the poor of the parish where such offence shall be committed, and the other third part thereof with double costs to the party that shall inform and sue for the same. *f. 3.*

Only one prosecution.

20. Provided that no person who shall be prosecuted by virtue of this act, for any the offences herein mentioned, shall be prosecuted for the same by virtue of any other act. *f. 4.*

Sales of houses, &c.

21. By the 13 *Geo. 2. cap. 8. Sect. 1.* If any person shall set up or keep any office or place under the denomination of sales of houses, land, advowsons, presentations to livings, plate, jewels, ships, goods or other things, by way of lottery or by lots, tickets, numbers or figures, cards or dice, or any other device determining chances, or shall make, print, advertise or publish, proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by chances of the prizes, either in some public lottery allowed by act of parliament in *Great Britain* or *Ireland*, or in any foreign lottery, or shall deliver out tickets to the persons advancing such sums, to intitle them to a share of the money so advanced, or shall expose to sale any houses, lands, advowsons, presentations to livings, plate, jewels, ships or other goods, by any game or device depending upon, or to be determined by any lot or drawing, whether it be out of a box or wheel, or by cards or dice, or by any machine, engine or device of chance of any kind, such persons and every of them, shall upon being convicted thereof, before any justice of the peace, or before the chief magistrate or other justice of the peace for any city or town-corporate, upon the oath of one credible witness, or upon the view of such justice or chief magistrate, or on the confession of the parties accused, forfeit one hundred pounds, to be levied by distress and sale of the offenders goods, by warrant of one justice of such county, city, or town, where the offence shall be committed, which forfeitures after deducting the reasonable charges of such prosecution, shall be applied, one third to the informer, and the remaining two thirds to the *Incorporated Society* for promoting *English protestant schools*, for the use of such of the charter-schools as they shall think fit.

Penalty.

Chance of cards and dice.

22. All games and lotteries to be determined by the chance of cards and dice, under the denomination of the games of the ace of hearts, pharaoh, basset, hazard or passage, are games or lotteries by cards or dice within the intent of the acts 10 *Will. 3. cap. 11.* 6 *Ann. cap. 17.* and 11 *Ann. cap. 6.* and all persons who shall set up or keep the said games, shall be liable to all the penalties and forfeitures by this act inflicted upon persons who shall set up or keep any of the games or lotteries in this act mentioned, and shall be prosecuted and convicted, and the penalties shall be sued for and recovered in like manner, as by this act directed. *f. 2.*

23. All

23. All persons who shall be adventurers in any of the said games, lotteries, or sales, or shall play, set at stake or punt at, either of the said games of the ace of hearts, pharaoh, basset, hazard, and passage, or shall act contrary to the intent of the said acts or this present act, and shall be thereof convicted as by this act is prescribed, shall forfeit thirty pounds, to be sued for, recovered, and applied as aforesaid. *f. 3.*

24. All such sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods or other things, by any game, lottery, machine, engine, or other device depending upon, or to be determined by chance or lot, shall be void; and all such houses, &c. or other things set up and exposed to sale in manner aforesaid, shall be forfeited to such persons who shall sue for the same by action, &c. in any court of record, or at the assises for any county where the offence shall be committed, in which no essoign, &c. shall be allowed. *f. 4.*

25. If any persons shall think themselves aggrieved by the determination of any justice or chief magistrate upon any conviction for any of the offences in this act, or the before recited acts, such persons may appeal to the next general quarter-sessions of the peace for the county or place where such persons were convicted, but the persons so appealing shall give reasonable notice to the prosecutors of such their intention of bringing such appeal, and shall enter into a recognizance before some justice for the county or place wherein the conviction was made, with two sufficient sureties, on condition to try such appeal at the next quarter-session, and every such appeal shall by the court at the said next general quarter-sessions, to which such appeals are made, be finally determined and not afterwards, and in case such judgment or conviction shall be affirmed, the party appealing shall pay unto the prosecutors treble costs. *f. 5.*

26. No such conviction made, or judgment given as aforesaid by this act, shall be set aside by the court of quarter-sessions for want of form, in case the facts alledged in the said conviction shall be proved to the satisfaction of the said court; nor shall such conviction or judgment be removable by *Certiorari* or any other writ or process into any court of record at *Dublin*, until such order or other proceedings shall have been first removed to, and judgment given thereupon by such court of quarter-sessions. *f. 6.*

27. No writ of *Certiorari*, or other process, shall issue to remove the record of any such conviction from the quarter-sessions, or to remove any order or other proceedings made by the said court concerning such conviction, into any court of record at *Dublin*, until the parties against whom such conviction shall be made, before the allowance of such writ of *Certiorari* or other process, shall find two sufficient sureties to become bound to the prosecutor in one hundred pounds, with condition to prosecute the same with effect within six calendar months, and to pay unto the prosecutors treble costs, in case such order shall be affirmed. *f. 7.*

28. If any persons who shall be convicted of erecting, setting up, maintaining or keeping, any lotteries, or the said games herein before set forth, or therein shall adventure and shall not have sufficient goods whereon to levy the penalties inflicted by this act, or shall not immediately pay the said penalties or give security for the same, it shall be lawful for the justices before whom such person shall be convicted as aforesaid, to commit such per-

Gaming.

sons to the common gaol of the county or place where such offence shall be committed for any time not exceeding six months. *f. 8.*

Justice neglect-
ing to act.

29. If any justice of the peace or chief magistrate shall neglect to do what is required of them by this act, such justices and chief magistrates shall respectively forfeit ten pounds for each offence, one moiety whereof to be paid to any person who shall sue for the same, and the other moiety thereof to the *Incorporated Society* for promoting *English Protestant schools*, for the use of such of the said *Charter schools* as they shall think fit, and shall be recovered with full costs of suit, by action, &c. in any court of record, or at the assises, such prosecution being commenced within six months, &c. *f. 9.*

Exception.

30. Nothing in this act, or in any former acts against gaming, shall extend to hinder any persons from playing at any of the games in this, or the said former acts mentioned, within the precincts of *the castle of Dublin*, or other house in which the chief governors shall reside, during the time such chief governors shall actually reside therein, and no longer. *f. 10.*

Partition by
lots.

31. Nothing herein contained shall extend to affect or prejudice any estate or interest in lands, advowsons, presentations, rents, services, and hereditaments whatsoever, which shall be according to the laws now in being legally allotted to or held by any allotment or partition by lots, but that all persons that are or shall become seized as part-owners, joint-tenants, and tenants in common of any lands, &c. shall take such estates, interest, and parts therein, as they could have done by any lot, scroll, chance, or allotment whatsoever, had this act never been made. *f. 11.*

Three months.

32. No person shall be prosecuted for any offences against this act, unless they be prosecuted within three months after the offence committed. *f. 12.*

General issue.

33. If any action shall be prosecuted for any thing done in pursuance of this act, such action shall be commenced within three months after the fact, and shall be laid in the county or place where the cause of action shall arise, and the defendants may plead the general issue, &c. and if the plaintiffs shall become non-suited or discontinue their actions, or if upon demurrer judgment shall be given against the plaintiffs, the defendants shall recover treble costs. *f. 13.*

A. Warrant to apprehend a person for unlawfully gaming, having no visible estate.

Dublin. { To the constable of ———

WHEREAS complaint hath been duly made before us, that ——— of ——— in the said county of ——— doth frequently use to play at cards, dice, or other unlawful games, in the parish of ——— aforesaid, and that he hath no estate, nor follows any employment to maintain himself, but lives chiefly by gaming and sharpening upon other people: These are therefore in his majesty's name to require and authorize you to apprehend the said ——— and bring him before us, or some other of his majesty's justices of the peace for this

this county, to answer what shall be objected against him in that behalf, and to be dealt with according to law. Given under our hands and seals this ———

B. Commitment of a gamester, for want of security.

Dublin. { To the constable of ——— and to the keeper of his majesty's goal in and for the said county.

WHEREAS it hath been duly proved before us, that ——— of your said parish ——— on ——— the ——— day of ——— did play at cards, dice, and other unlawful games, at the house of ——— in ——— aforesaid, not having any visible estate or employment for his support and maintenance; and he the said ——— not being able to give sufficient security for his good behaviour for the space of twelve months, as the statute directs: These are therefore in his majesty's name to require and authorize you the said constable to convey the said ——— to the said goal, and to deliver him to the keeper thereof: And you the said keeper are hereby required to receive the said ——— into your custody, and him safely to keep in your said goal, until he shall give security as aforesaid. Given under our hands and seals ———

C. Form of a conviction.

County of { **B**E it remembred, that on this ——— day of ——— in the ——— to wit. ——— year of his majesty's reign, A. B. is convicted before ——— of his majesty's justices of the peace for the said county of ——— [or, for the city, liberty, or town of ——— as the case shall be] for ——— and ——— the said ——— do adjudge him, or her, to pay and forfeit for the same, the sum of ——— Given under ——— the day and year aforesaid.

Gaol and Gaoler.

For breaking of gaol, see Prison breaking.

- I. Building and repairing of gaols.
- II. Who shall have the keeping of gaols.
- III. Gaoler shall receive criminals.
- IV. How they shall be maintained.
- V. Selling of strong liquors in gaols.
- VI. How they shall be restrained and kept.
- VII. Of gaolers permitting escapes.
- VIII. How they shall be delivered.

I. Building and repairing of gaols.

1. **B**Y the 3 Geo. 3. cap. 28. *Whereas many infectious disorders are daily produced by the confinement of numbers in close prisons, whereunto there is no back yard adjoining, and the lives of his Majesty's subjects are endangered by the bringing of prisoners into publick streets for air; every grand jury at the assizes or quarter sessions aforesaid, are required and directed to contract either by lease, or to purchase a piece of ground next adjoining the gaol, or as near as conveniently can be had thereto, and cause to be erected necessary houses, and a wall sufficient for the security of the said prisoners.*

Necessary houses.

§. 7.

Purchase or rent.

2. The said grand juries at the assizes or quarter sessions aforesaid, are hereby impowered to raise by presentment, to be confirmed by the judge at such assizes, or by three of the justices in the city of *Dublin*, and by the recorder of the city of *Dublin* in the county of the said city, any sum to be levied off the county at large, not exceeding one hundred pounds, for the purchase of such ground, and building such houses and wall, or any yearly sum for the payment of such rent not exceeding ten pounds. §. 8.

Room for male.

3. *And whereas it often happens, that persons of insane mind and outrageous behaviour, are committed to prison for assaults, or other crimes not capital, which persons go now in common with the other prisoners: the grand juries aforesaid are hereby required and directed to present a sum of money to build a room in addition to the present gaols, where such is not already to be had, fit for the reception of such persons, and wherein the gaoler shall be impowered by a warrant from the next justice of the peace for the county wherein such gaol shall lie, to confine any such person, information upon oath having first been given to such justice of the peace of the insanity or other outrageous behaviour of every such prisoner.* §. 9.

Presentment for building it.

4. The said grand juries at the said assizes and quarter sessions aforesaid, are hereby impowered to raise by presentment, to be confirmed as aforesaid, of the county at large, any sum not exceeding thirty pounds for building such a room. §. 10.

The sexes kept distinct.

5. In all gaols hereafter to be built, there may be distinct apartments for the men and women, and all gaolers whose gaols will at present admit of such a distinction, may be obliged to separate and keep apart the different sexes. §. 11.

Danger of escape.

6. Provided the same may be done without any risque or danger of an escape of any of the said prisoners, of which if apprehended, the gaoler shall give notice to the next justice of the peace, and if the said justice shall upon visiting the said gaol see sufficient grounds for such apprehensions, or that the said gaol is insufficient for the purpose aforesaid, he shall by writing under his hand give to the said gaoler a certificate thereof, and if any gaoler shall offend contrary to the intent and meaning hereof, he shall for every such offence forfeit five pounds, to be recovered by civil bill, the penalty to go to the informer.

Presentment for altering gaols.

7. The said juries shall be impowered to raise and levy by presentment, to be confirmed as aforesaid, any sum not exceeding one hundred pounds, for altering the gaols already built in manner aforesaid. §. 12.

II. Who

II. Who shall have the keeping of gaols.

1. The gaol it self is the king's, but the keeping thereof is incident to the office of the sheriff, and inseparable from it; except such gaols whereof any persons have the keeping by inheritane or succession. *14 Ed. 3. ft. 1. c. 10. 19. H. 7. c. 10. 2 Inst. 589.* The Gaol is the King's,
2. And therefore the sheriffs shall put in such keepers for whom they will answer. *14 Ed. 3. ft. 1. c. 10.*
3. By the act, *3 G. 3. c. 28.* No sheriff, or other persons, bodies corporate or politick, having power to appoint a gaoler, shall by themselves, or any other person in trust for them, take any fee or gratuity, or reserve any rent payable out of any such gaol for such appointment, under the penalty of five hundred pounds, one moiety thereof to be paid to the king, the other to the informer, with full costs of suit, who shall by bill, plaint, or information, in any of his Majesty's courts of record, first sue for the same. *f. 1.* No fee or rent for gaols,
- 4 And a gaoler in fact, is as much punishable for a misdemeanor in his office, as if he were a rightful gaoler. *2 Haw. 134.*

III. Gaoler shall receive criminals.

1. All felons shall be imprisoned in the common gaol, and not elsewhere. *5 H. 4. c. 10.*
2. And if the gaoler refuses to receive a felon, or take any thing for receiving him, he shall be punished for the same by the justices of gaol delivery. *4 Ed. 3. c. 10. Dalt. c. 170.*

IV. How they shall be maintained.

1. Lord Coke says, the gaoler cannot refuse the prisoner victuals, for he ought not to suffer him to die for want of sustenance. *1 Inst. 295.*
But this is denied by others; and as there are several statutes which provide for the maintenance of prisoners, without supposing the gaoler any way obliged to it, it seemeth that this opinion is not maintainable. *Bac. Abr. Gaol, gaoler. F.*
2. By the *3. G. 2. c. 5.* The money, raised for the use of the poor prisoners and levied according to the usual methods of raising publick money, shall be by the treasurers of the counties paid to the ministers of the parishes wherein the gaols for such counties are respectively kept, or in the absence of such minister to his curate, and the money so to be received by the minister or curate, or so much thereof as to them shall seem necessary, shall be by them and the churchwardens of the said parishes weekly distributed to or laid out in bread or other necessaries for the poor prisoners, in the said gaols, who have no means to maintain themselves, in such proportion as to the minister or curate and churchwardens shall seem convenient.

3. And

Gaol and Gaoler.

3. And by the 3 G. 3. c. 28. The minister, or curate shall weekly deliver bread, to be by them or either of them bought upon the best terms that bread is usually sold for in the parish, to such of the said prisoners confined in gaol, as seem to him or them to be in want, and to no other.

4. And every minister or curate shall from time to time, as he shall see occasion, visit and view the prisoners in gaol, and if any prisoner appear to be afflicted with sickness, and to stand in need of medicines, the said minister or curate is hereby empowered to employ a physician, apothecary, or surgeon, and to pay for such medicines as shall be by them or either of them prescribed, and made use of.

V. Selling of strong liquors in gaols.

No gaoler shall
brew or bake,

By the 3 G. 3. c. 28. No gaoler, or any person in trust for him, shall brew or bake in the gaol, or in the houses hereby appointed for the use of the prisoners confined in the said gaol, or shall in any place brew or bake for sale, or keep any shop for the selling of bread, or beer, or ale, or other liquors, under the penalty of five pounds for every such offence, to be recovered in the usual manner by civil bill, by the person who shall inform.

No licence to
gaols, &c.

And by the 3 G. 3. c. 21. No licence shall be granted for the retailing of spiritous liquors, beer, ale, wine, cyder, or other liquors within any gaol, prison, house of correction, workhouse, or house of entertainment for any parish poor, and all licences granted, or to be granted, contrary to this provision, shall be void. *Stat. 15.*

VII. How they shall be restrained and kept.

The county gaol is the prison for malefactors; but prisoners for debt, where escape lies against the sheriff for their escaping, may be kept in what place the sheriff pleases. *L. Raym. 136.*

Nevertheless it seemeth generally in all cases where a man is committed to prison, especially if it be for felony, or upon an execution, or but for a trespass or other offence, every gaoler ought to keep such prisoner in safe and close custody; safe, that he cannot escape: and close, without conference with others or intelligence of things abroad. *Dalt. c. 170.*

And therefore if the gaoler shall licence his prisoner to go abroad for a time, and then to come again, or to go abroad with a keeper, tho' he come again, yet these are escapes. *Dalt. c. 170.*

And hereupon it is lawful for the gaoler to hamper a felon with irons to prevent his escape. *1 H. H. 601. Dalt. c. 170.* and it is said, that a gaoler is no way punishable for keeping even a debtor in irons. *2 Haw. 152.*

But the learned editor of *Hale's history* observes, that this liberty even in the case of a felon (much more in the case of a prisoner for debt) can only be intended, where the officer has just reason to fear an escape; as where the prisoner is unruly, or makes any attempt to that purpose; but otherwise, not.

notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of *England*, by which gaolers are forbidden to put their prisoners to any pain or torment. And lord *Coke*, 2 *Inst.* 381. is express, that by the common law it might not be done. 1 *H. H.* 601.

And if the gaoler keep the prisoner more straitly than he ought of right, whereof the prisoner dieth, this is felony in the gaoler by the common law: and this is the cause, that if a prisoner die in gaol, the coroner ought to sit upon him; and if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, it will be deemed wilful murder in the person guilty of such duress. 3 *Inst.* 91. *Fost.* 321, 322.

But if a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71. 1 *H. H.* 496. For gaolers and their officers are under the same special protection that other ministers of justice are. And therefore if in the necessary discharge of their duty they meet with resistance, whether from prisoners in civil or criminal suits, or from others in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely and without retreating repel force with force. And if the party so resisting happeneth to be killed, this on the part of the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide. On the other hand, if the gaoler, or his officer, or any person coming in aid of him, should fall in the conflict, this will amount to wilful murder in all persons joining in such resistance. It is homicide committed in defiance of the justice of the kingdom. *Fost.* 321.

1. By the act, 3 *Geo.* 3. *cap.* 28. At every quarter sessions held in or for the respective counties, counties of cities, and counties of towns in this kingdom, the gaoler or prison-keeper for every respective gaol or prison for such county, city, or town, shall furnish the justices, who shall preside at such sessions, with a true kalendar of the persons actually in his custody. *f.* 13. Gaolers to furnish kalendar's.

2. And the said justices may, if they think proper order, the prisoners to be brought into the court, provided such sessions are held in the city or town wherein such gaol or prison shall be kept, and there examine them touching any fraud, severity, or exaction, of any such gaoler or prison-keeper. Examination of frauds, &c.

3. And if any such shall appear upon proof, the said justices shall signify the same by writing under their hands to the high sheriff or his deputy, or other persons who usually nominate or appoint such gaoler or prison-keeper, who are hereby required to nominate and appoint another person, to take care of any such gaol or prison, in the room of such persons as shall be so objected to by the said justices. Removal of gaolers,

4. In case any person so usually nominating or appointing any such gaoler or prison-keeper shall refuse or neglect to act as herein before directed, it shall be lawful for the next going judge of assize in every such county, city, or town, or for the said justices in the county of *Dublin*, or the said recorder in the county of the said city, to impose a fine or penalty upon the person so neglecting or refusing, not less than ten pounds, unless Refusal to remove gaolers,
Fine by judges, of assize, &c.
it

Gaol and Gaoler.

it shall appear to such judge that such removal or new appointment could not be made without manifest danger to the security of the said gaol.

But forasmuch as the gaol is intended, in most cases, for custody and not for punishment; and confinement itself, especially in such dismal abodes as it is to be feared many of the gaols are, is sufficiently afflictive and disconsolate; human nature will plead for those miserable objects, that their condition be rendered as tolerable as the case will admit of; particularly with regard to cleanliness, which is the parent of health; and wholesome air, which is life itself.

A remarkable effect of want of care in this respect, Sir *Michael Foster* takes notice of, in the case of one Mr. *Clarke*, who was brought to his trial at the *Old Bayly* sessions in *April 1750*. It being a case of great expectation, the court and all the passages to it were extremely crowded. The weather also was hotter than is usual at that time of the year. Many people who were in court, were sensibly affected with a very noisome smell. And it appeared soon afterwards, upon an enquiry ordered by the court of aldermen, that the whole prison of *Newgate*, and all the passages leading thence into the court, were in a very filthy condition, and had long been so. What made these circumstances to be at all attended to was, that within a week or ten days at most after the session, many people who were present at Mr. *Clarke's* trial were seized with a fever of the malignant kind, and few who were seized recovered. The symptoms were much alike in all the patients; and in less than six weeks the distemper entirely ceased. At the time this disaster happened, there was no sickness in the gaol, more than is common in such places. Which circumstance, that distinguisheth this from most of the cases of the like kind which we have heard of, suggests a very proper caution, not to presume too far upon the health of the gaol, barely because the gaol fever is not among the prisoners. For without doubt, if the points of cleanliness and free air have been greatly neglected, the putrid *effluvia* which the prisoners bring with them in their cloaths or otherwise, especially where too many are brought into a crowded court together, may have fatal effects on people who are accustomed to breathe better air; tho' the poor wretches, who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience from them. The persons of chief note who were in court at this time, and died of the fever, were Sir *Samuel Pennant* lord mayor for that year, Sir *Thomas Abney* one of the justices of the common pleas, *Charles Clarke* esquire one of the barons of the exchequer, and Sir *Daniel Lambert* one of the aldermen of *London*. Of less note, a gentleman of the bar, two or three students, one of the under-sheriffs, an officer of lord chief justice *Lee* who attended his lordship in court at that time, several of the jury on the *Middlesex* side, and about forty other persons whom business or curiosity had brought thither. *Fost. 74.*

VIII. How they shall be delivered.

1 By the 3 *H. 7. c. 3.* Those that have the custody of gaols, must certify the names of all prisoners, to the justices of gaol delivery, in order to their trial or discharge; on pain of 5 *l.*

And

And a gaoler must not disobey a writ of *habeas corpus*, for want of his fees; but the court will not turn the prisoner over, till the gaoler be paid all his fees. 2 *Hawk.* 151.

f. 3.

IX. *Of gaolers permitting escapes.*

But for a negligent escape suffered by his bailiff, the sheriff is as much liable to answer, as if he had actually suffered it himself; and the court may charge either the sheriff or bailiff for it; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him.

2 *Haw.* 135.

1. **BY** the 3 G. 3. c. 4. There shall be paid unto his Majesty, by every Tax on hawk-
hawker, pedlar, petty chapman, or other trading persons going kers, &c.
from town to town, or to other mens houses, and travelling either on foot
or with horses, or otherwise (except as herein after mentioned) carrying to
sell, or exposing to sale, any goods, a duty of twenty shillings by the year.
s. 1.

f. I.

Z z

2. And

Hawkers and Pedlars.

Beast of bur-
then.

2. And every person so travelling with a horse, ass, or mule, or any other beast bearing or drawing burthen, shall pay twenty shillings by the year, for each beast bearing or drawing burthen, he or she shall so travel with, over and above the said first-mentioned duty of twenty shillings by the year.

Collected as
ale-house
licences.

3. Which duties shall be collected by such persons, and in such manner, as the duty payable for licences to keep ale-houses is collected, by virtue of an act made in the thirty-third year of the reign of his late Majesty, *for better regulating the collection of his Majesty's revenue, &c.*

Constables
neglecting.

4. If any constable shall refuse or neglect, upon due notice, or on his own view, to be aiding and assisting in the execution of this act, being thereunto required, every such constable, being thereof convicted by the oath of one credible witness, before any justice of the peace for the county or place where such offence shall be committed, shall forfeit, for every such offence, forty shillings, to be levied by distress and sale of the offenders goods, by warrant under the hand and seal of such justice of the peace, one moiety whereof to be paid to the incorporated society, the other moiety to the informer, who shall prosecute for the same. *f. 9.*

Forfeit forty
shillings.

Any person
may seize, &c.

5. It shall be lawful for any person to seize and detain any such hawker, pedlar, petty chapman, or other trading persons as aforesaid, and also the goods they shall be found trading with, until such time as they shall produce a licence in that behalf, if they have any; and if they shall be found trading without such licence, contrary to this act, it shall be lawful for such persons so seizing as aforesaid, taking to their assistance such persons as they shall think fit, to carry the person so seized, as also the said goods, before some one justice of the peace of the county or place, or before the collector of his Majesty's revenue, for the district where such offences shall be committed. *f. 10.*

Justices to levy
the penalty.

6. Which justice of the peace and collector respectively, are required, either upon the confession of the party offending, or due proof of a witness upon oath, which they are hereby respectively empowered to administer, that the person so brought before him, had so traded as aforesaid, unless such licence shall be produced by such offender, before the said justice or collector, by warrant under his hand and seal, to cause five pounds to be forthwith levied by distress and sale of the offenders goods, after deducting the reasonable charge for taking the said distress, and out of the said sale to pay the penalty aforesaid.

Hearth money.

Two shillings
for every
hearth.

1. **BY** the 14 & 15 Car. 2. cap. 17. *sect. 1.* Every dwelling and other house erected within this kingdom, other than such as are hereafter excepted, shall be chargeable with the annual payment to the king, for every fire hearth and other place used for firing and stoves within every such house, two shillings by the year.

Exception.

2. No person who lives upon alms, and is not able to get his or her living by his or her work, shall be chargeable with the duties by this act imposed. *f. 12.*

3. This

3. This act shall not extend to charge any private oven or kiln within any of the houses hereby charged, or any hearth or stove within the site of any college, hospital, or alms-house. *f. 18.*

4. The payments and duties hereby charged, shall be charged only on the occupier for the time being, dwelling in such house whereto such hearth or stove shall be belonging, his executors or administrators, and not on the landlord. *f. 19.* Charge upon the occupier.

5. And by the 17 & 18 *Car. 2. cap. 18.* It shall be lawful for the chief Appointment of collectors. governors of this kingdom and council, to appoint such persons as they shall think meet to be the officers for collecting and answering the duty arising by hearths, &c. *f. 4.*

6. After such appointment of such officers in any county to collect the said duty, and notice thereof being given to the sheriffs of the county, the said duties shall be paid to such officer as shall be so appointed to receive the same upon demand thereof by such officer or his deputy, at the house, chamber, or place where the duty shall arise or grow due.

7. And in case of refusal or default of payment after such demand, the said officer or his deputy, may at any time, with the assistance of a constable or other officer as aforesaid, in the day time levy the said duty and all the arrearages thereof, by distress and sale of the goods of the parties so refusing or making default, restoring to the parties the overplus of the value of such goods, over and above the duty and arrearages thereof then behind, and the necessary charges of taking such distress, which charges shall in no case exceed the fourth part of the duty and arrearages thereof so levied. Refusing payment.

8. And in case the said constable or other officer shall refuse or neglect to give his assistance in manner as before named, such constable or other officer for every such refusal or neglect, shall forfeit forty shillings, to be recovered by action of debt, &c. in any of his Majesty's courts of record, the one moiety to the use of his Majesty, and the other moiety to them that shall sue for the same. Constable neglecting.

9. Provided that no owners, proprietors, or occupiers of the said hearths, &c. shall be charged, distrained, or molested for the said duty or any arrearages after two years after the duty shall become due, nor for any arrears of the said duty which shall not appear upon record in his Majesty's exchequer. Arrearage after two years.

10. If any person shall fraudulently stop up, deface, cover, or conceal any hearth, &c. chargeable by the said act or this present act, and the same be proved either by confession of the party or upon oath, before one justice of the peace or chief magistrate, or such persons as shall be authorized therefore, or by their view, he shall for such offence pay double the value of the duty for the same, to be levied as aforesaid. *f. 8.* Concealing hearths.

11. And if any question or difference shall arise about the taking of any distress or levying any monies by virtue of this or the former act, the same shall be heard and finally determined by one or more justices of the peace near adjoining, or chief magistrate of the place respectively, upon complaint in that behalf. Disputes heard by a justice.

12. And the justices of the peace and chief magistrates, and other his Majesty's officers within their several limits and jurisdictions, are required to give assistance to such officers as shall be so appointed for the collecting of the said duty, according to the said former and this present act. Justices to aid officers.

Widows certificates.

13. And whereas there is one clause in the said former act, *that in case any two justices of the peace shall, in writing under their hands yearly, certify their belief, that the house wherein any person doth inhabit within such county, wherein they are justices, is not of greater value than eight shillings per annum upon the full improved rent, and that neither the person inhabiting, nor any other using the same messuage, bath, or occupieth any lands of the value of eight shillings per annum, nor hath any lands, goods, or chattels, of the value of four pounds in their own possession, or in the possession of any other in trust for them, upon such certificates made to the justices of such county, at their quarter-sessions and allowance by them, for which certificate and allowance, no fee shall be paid, the person on whose behalf such certificate is made, shall not be returned by the constable or other persons to be assistant to them, and the said house is for that year discharged of all duties by this act imposed; the said clause shall be construed to extend only to such widows as shall produce such certificates as are therein mentioned, and as to all other persons whatsoever, the said clause is hereby repealed.* *f. 11.*

Collegiate churches.

14. No houses within the precinct of any cathedral or collegiate church, shall, by the aforesaid act, be discharged of the duties thereby, or by this present act, payable to his Majesty. *f. 12.*

Private ovens and kilns.

15. Whereas by the said former act, private ovens and kilns are not to be charged with any duty to his Majesty, as other hearths, firing places, and stoves, all ovens in bakers houses, and in taverns, inns, and victualling houses, as also all kilns wherein malt or other grain shall be dried to be sold, shall be deemed to be public ovens and kilns, and shall be charged accordingly, and all other ovens and kilns shall be accounted and taken as private ovens and kilns, and shall not be charged with any duty to his Majesty for the same. *f. 13.*

Duty at one payment.

16. The said duty, by the aforesaid and this present act, made payable to his Majesty, shall be payable yearly on the tenth day of *January*, at one entire payment. *f. 14.*

Double duty.

17. Whereas fires are often made in such dwelling houses, as have no fixed hearth with chimnies over them, which may occasion uncertainties in the returns to be made of hearths and firing-places, wherein any omission is penal by this act, all such houses shall be deemed to have two hearths, and be chargeable with payment of the duty accordingly, until such time as there shall be one fixed hearth, with a chimney placed over the same in every dwelling house.

A certificate that a widow's house is not worth above eight shillings a year.

County of { **WE** A. B. and C. D. esquires, two of his Majesty's justices
—to wit. { of the peace, for the county aforesaid, do hereby certify,
That, to our belief, the house wherein E. F. of C. in the said county, widow,
now dwells, is not of greater value than eight shillings by the year; and that
she, or any other person, using the said house, hath not, nor occupieth lands or
tene-

Hearth-money.

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tenements, of their own, or others, of the yearly value of eight shillings, nor hath, nor have, any lands, goods, or chattels, of the value of four pounds, in her, or their own possession, or any in trust for her or them. *Witness our hands and seals, this second day of August, 17—.*

Hides and Skins.

1. **B**Y the 8 Geo. 1. cap. 7. Every person salting hides for sale, shall lay the same flesh to flesh, under penalty of forfeiting ten shillings for each hide that shall be otherwise laid, by the persons in whose custody the same shall be found to be otherwise laid, to be recovered and applied as herein after is mentioned. *f. 15.* Laying hides for sale.

2. In case any hides or calf-skins shall be impaired by gashing, flawtering or cutting the same, not only the persons so offending, but likewise the persons who shall expose to sale such hides or calf-skins, shall forfeit for each hide so impaired, a sum not exceeding ten shillings, and for each calf-skin, a sum not exceeding two shillings and six-pence, which forfeitures shall be recovered and applied as is herein after mentioned. *f. 17.* Gashing hides or skins.

3. Every person whatsoever may seize and detain every person and his goods which shall be made up, packed, or bought and sold contrary to the intention of this act, for such reasonable time as he, she, or they may give notice to the constable of the parish, where such person, or his goods, shall be so seized, who shall carry such person and his goods before the chief magistrate of the city or town corporate, or before some one justice of the peace, where such offence shall be committed, if in no city or town corporate. *f. 20.* Seizing offenders.

4. Which said magistrate or justice, either upon confession of the offender, or due proof by one or more witnesses upon oath, that the person so brought before him hath offended contrary to the meaning of this act, shall, by warrant under his hand and seal, cause such penalties, as the offenders are hereby liable to, to be forthwith levied by distress and sale of the offender's goods, rendering the overplus (if any be) to the owner, after deduction of reasonable charges for taking the said distress, and out of the said distress to pay the said penalties and forfeitures to the informer. Conviction.

5. And if such offender or offenders, shall not have goods and chattels sufficient to answer the penalties, he or they shall, by warrant under the hand and seal of such magistrate or justice, be publicly whipt three market days successively, through some market town in the said county, in or near such place, where the offence was committed, between the hours of eleven and twelve in the forenoon. Levying penalties.

This act is continued until the 29th of September, 1769, by stat. 21 Geo.

2. cap. 7. with the restrictions before-mentioned, at the end of the preceding act.

6. And by the 12 Geo. 1. cap. 5. In case any weigh-masters, their deputies, or other person in trust for them, shall buy, sell, contract, or treat for, any green or salt hides in any city or town corporate, or place of export, Whipping for want of distress.
where Weigh-masters buying hides.

Hides and Skins.

where such weigh-masters or their deputies are appointed, before such hides are legally weighed, discharged, and carried off from such weigh-house, they shall, being thereof lawfully convicted before the chief magistrate of the place, or the next justice of the peace, forfeit for every such offence, the goods so bought or sold by them, to be recovered by warrant of such magistrate or justice; one moiety to the poor of the parish where the offence was committed, and the other to the informer. *s. 9.*

No replevin
for seizures.

7. Whenever any salt hides are seized or brought for trial before the magistrate, or justice of the peace, or seneschal, or are adjudged and condemned by them, or whenever any distress is or shall be taken pursuant to this or former acts of parliament, no replevin shall lie, but the judgment of the magistrate or justice shall be conclusive. *s. 11.*

This act is continued by Stat. 21 Geo. 2. cap. 7. sect. 9. until the 29th of September, 1769, and to the end of the then next session of parliament, with the amendments and alterations made by this last statute, which relate to other beads.

A warrant for salting hides for sale without laying flesh to flesh.

To the constable of———

County of Dublin, } **F**ORASMUCH as it hath this day been duly proved before me upon oath, that A. B. of S. Street, in the county aforesaid, did, on the second day of this instant August, in New-Market, in the liberties of Thomas-Court and Donore, salt ten hides for sale, without laying flesh to flesh, as the statute directs; whereby he hath forfeited the sum of ten shillings for every hide, wherefore the whole forfeiture comes to five pounds:

These are therefore, in his Majesty's name, to command you, forthwith to levy the said sum of five pounds on the goods of the said A. B. by distress and sale thereof, rendering him the overplus, after deduction of the reasonable charges for taking the said distress, and that you pay the said forfeiture to E. F. of T. Street, aforesaid, who informed me of the said offence: Hereof fail not.
Given———

The like warrants, *mutatis mutandis*, for gashing and cutting hides.

I. What

- I. *What is a highway.*
- II. *Appointment of the surveyor.*
- III. *Who shall repair.*
- IV. *The proportion of labourers and carriages.*
- V. *Providing materials.*
- VI. *Concerning the six days work.*
- VII. *Of annoyances in general.*
- VIII. *Ditches adjoining to the highway.*
- IX. *Hedges adjoining to the highway.*
- X. *Straw, dung, stones, timber, laid in the highway.*
- XI. *Gate erected across the highway.*
- XII. *Encroachments on the highways.*
- XIII. *Nuisance by unlawful breadth and tire of wheels.*
- XIV. *Breadth and widening of highways.*
- XV. *Presentment or indictment of the highways in general.*
- XVI. *Power of the justices to punish offences.*
- XVII. *Turnpikes.*

I. *What is a highway.*

1. **T**HERE are three kinds of ways; 1. A foot way. 2. A foot and horse way, which is also a pack or drift way. 3. A foot, horse, and cart way. *1 Inst. 56.* Three kinds of highways.

2. It seemeth that any one of the said ways, which is common to all the king's people, whether it leads directly to a market town, or only from town to town, and does not terminate there, but is also a thoroughfare to other towns, may properly be called a highway. *1 Haw. 201.* Difference between a highway and a private way.

For there were highways before there were market towns. And if it were essential to the constituting of a highway, that it should expressly lead from market town to market town; then it would follow, that the lord of a market, by forfeiting or surrendering his charter, might cause that to cease to be a highway, which was a highway before; or the king, by granting a market in any place where there was no market before, might thereby consequentially change the way to it from a private way into a highway.

And therefore, the distinction which is taken in some books, concerning this matter, seems to be very reasonable; that every way from town to town may be called a highway, because it is common to all the king's subjects; and consequently that a nuisance therein is a common nuisance, and punishable by indictment: but that a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because

Highways.

cause it belongeth not to all the king's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance therein. 1 *Haw.* 201.

So if I have a private way without a gate, and a gate is hung up; an action lies upon the case, for I have not my way as I had before. *Litt. R.* 267.

So if one grants me a way, and afterwards digs trenches in it to my hindrance; I may fill them up again. *Godb.* 53.

But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, and so the same be filled with water; yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. *Godb.* 52. But in such case, he may bring his action against the owner of the land for spoiling the way; or perhaps he may go out of the way, upon the land of the wrong doer, as near to the bad way as he can.

But where a private way is spoiled by those who have a right to pass thereon, and not through the default of the owner of the land; it seemeth that they who have the use and benefit of the way ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement.

How far outlets are part of the highway.

3. It hath been holden, that if there be an highway in an open field, and the people have used time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; from whence it follows, that if such outlets be sown with corn, and the beaten track be foundrous, the king's subjects may justify going upon the corn. 1 *Haw.* 201.

How far a river may be an highway. Highway changed.

4. In books of the best authority, a river common to all men is called an highway. 1 *Haw.* 201.

5. It seemeth to be agreed, that an ancient highway cannot be changed, without the king's licence first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found, that such a change will not be prejudicial to the publick; and it is said, that if one change a highway without such authority, he may stop the new way whenever he pleases; and it seemeth that the king's subjects have not such an interest in such new way, as will make good a general justification of their going in it as a common highway, but that in an action of trespass brought by the owner of the land, against those who shall go over it, they ought to shew especially, by way of excuse, how the old way was obstructed, and the new one set out; also it is said, that the inhabitants are not bound to keep watch in such a new way, or to make amends for a robbery therein committed, or to repair it. 1 *Haw.* 201.

However it is certain, that a highway may be changed by the act of God; and therefore it hath been holden, that if a water which has been an ancient highway, by degrees changes its course, and goes over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. 1 *Haw.* 202.

To whom the freehold of an highway belongeth.

6. The freehold of the highway is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. 2 *Inst.* 705.

H. 8 G. 2. *Sir John Lade against Shepherd.* Upon trial of an action of trespass, a case was made; that the place where the supposed trespass was com-

committed, was formerly the property of the plaintiff, who some years since built a street upon it, which has ever since been used as a highway; that the defendant had lands contiguous, parted only by a ditch, and that he laid a bridge over the ditch, the end whereof rested on the highway. And it was insisted for the defendant, that by the plaintiff's making it a street, it was a dedication of it to the publick; and therefore, however he might be liable to an indictment for a nuisance, yet the plaintiff could not sue him as for a trespass on his private property. But by the court; It is certainly a dedication to the publick, so far as the publick has occasion for it, which is only for a right of passage: but it never was understood to be a transfer of the absolute property in the soil. So the plaintiff had judgment. *Str.* 1004.

II. Appointment of the surveyors.

1. By the act 11 *Jac.* 1. *cap.* 7. The constables and churchwardens of every parish, shall yearly upon the Tuesday and Wednesday in Easter-week, See *Par.* 3. call together a number of the parishioners, and shall then choose two honest persons of the parish to be surveyors and orderers of the works for the amendment of the highways, cashes, and places in their parish leading to any market town, which persons shall order and direct the persons and carriages that shall be appointed for those works by their discretions, and the said persons so named shall take upon them the execution of their said offices, upon pain to forfeit ten pounds. *f.* 1. Appointment of overseers.

2. And by the 4 *Ann.* *cap.* 6. In case any parish do neglect appointing such overseers as by the said law they are directed to do, every such parish shall be prosecuted by presentment at the next following sessions for such neglect, and at the said sessions such overseers may be appointed for the said year as by the said parish ought to have been appointed, who shall have the same power as if they had been chosen pursuant to the former act. *f.* 7. At the sessions.

3. But by the act, 1 *Geo.* 2. *cap.* 13. The time for appointing overseers of the highways, shall be on the Tuesday or Wednesday next after Michaelmas day in every year; and the overseers then to be appointed shall have such powers as overseers of the highways appointed on the Tuesday or Wednesday in Easter week could exercise, and a vestry shall be held yearly in every parish, on the Tuesday or Wednesday after Michaelmas day for that purpose. *f.* 2. Time for appointment.

4. And if the parishioners of any parish shall neglect at the time afore- said to appoint such overseers, it shall be lawful for the grand jury at the quarter-sessions, or in case of their neglect, for the grand jury at the next assizes held for the respective counties where such default shall be, to appoint overseers of the highways, and apply the six days labour in such manner as the parishioners or the overseers of the highways of the said parishes ought to have done. By the grand juries.

5. And by the 33 *Geo.* 2. *cap.* 8. Where neither the parishioners, nor grand juries, have appointed overseers, two justices of the peace are hereby empowered to name overseers for such parishes. *f.* 5. By two justices.

III. Who shall repair.

Parish in general to repair.

It seems to be agreed, that of common right (that is, by the common law) the general charge of repairing all highways lies on the occupiers of the lands in the parish wherein they are: but there is no doubt, but particular persons may be burdened with the general charge of repairing a highway, in two cases:

Repairing in respect of an inclosure.

1. In respect of an inclosure of the land wherein it lies; as where the owner of lands not inclosed, next adjoining to the highway, incloseth his lands on both sides thereof; in which case, he is bound to make a perfect good way, and shall not be excused for making it as good as it was at the time of the inclosure, if it were then any way defective; because before the inclosure, the people used, when the way was bad, to go for their better passage, over the fields adjoining, out of the common track, which liberty is taken away by the inclosure. 1 *Haw.* 202.

And if the way is not sufficient, any passenger may break down the inclosure, and go over the land, and justify it, till a sufficient way is made. 3 *Salk.* 182.

Also it hath been holden, if one inclose land on one side, which hath been antiently inclosed on the other side, he ought to repair all the way; but if there be not such an antient inclosure of the other side, he ought to repair but half that way; and it is said, that wherever one is bound to repair a highway, in respect of an inclosure, and lays it open again as it was before, he shall be freed from the charge of repairing it. 1 *Haw.* 202.

Repairing by prescription.

2. A particular person may be bound to repair a highway, in respect of a prescription; and it is said, that a corporation aggregate may be compelled to do it, by force of a general prescription, that it ought and hath used to do it, without shewing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation in judgment of law never dies, and therefore if it were ever bound to such a duty, it must needs continue to be always so; neither is it any plea, that such corporation hath always done it out of charity, for what it hath always done, it shall be presumed to have been always bound to do: but it is said, that a person cannot be charged with such a duty, by a general prescription from what his ancestors have done, unless it be for some special reason, as the having land descended from such ancestors, which are holden by such like service. 1 *Haw.* 202.

Yet it seems, that an indictment charging a tenant in fee simple, with having used of right to repair such a way by reason of the tenure of his land, is certain enough, without adding, that his ancestors or those whose estate he hath, have always so done; for that is implied. 1 *Haw.* 203.

But the indictment must set forth, where those lands lie. 2 *H. H.* 181.

IV. The proportion of labourers and carriages.

1. Every person, for every ploughland in tillage or pasture that he shall occupy in the parish, shall find and send at every day and place appointed, one wain or cart, furnished after the custom of the country with oxen, horses,

or

or other cattle, and all other necessities meet to carry things convenient for that purpose, and also two able men with the same. 11 Jac. cap. 7. sect. 1.

Every person] It hath been holden, that persons in holy orders are within the purview of these statutes, in respect of their spiritual possessions, as much as any other persons whatsoever in respect of any other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others. 1 Haw. 204. But by the 30 G. 2. c. 25. persons serving for themselves as private men in the militia, shall during the time of such service be exempted from personally doing any highway duty, commonly called statute work. s. 23.

For every ploughland] Therefore if he occupies and keeps in his possession several ploughlands in several towns, he shall be charged to find in each town or parish where such ploughlands do lie, one cart or carriage, in like manner as if he were a parishioner in the several parishes.

Ploughland] By the act 33 Geo. 2. cap. 8. One hundred acres of land, as the same stand in the county books, or are usually estimated for applotting money presented by grand juries, shall be the contents of plow lands, for the purpose of executing the laws relating to the six days labour, for the repair of highways in every county which have not hitherto ascertained their plow lands, until the grand juries of such counties shall ascertain their plow lands, pursuant to the directions of the act 9 Ann. cap. 9.

That he shall occupy] It hath been holden, that notwithstanding the words of the statute extend only to the occupiers of land, yet if the owner neither occupy them, nor let them, but suffer them to lie fresh, he shall be charged as much as if he had occupied them; for there is no reason that the publick should suffer for his negligence. 1 Haw. 204.

In the parish] And if he shall occupy a ploughland lying in several parishes, he shall be chargeable within the parish where he dwelleth, in like manner as a person having a ploughland in any one parish.

2. Also every other person keeping a draught or plough in the parish, shall find and send one wain or cart in like manner, with two able men. 11 Jac. 1. cap. 7. sect. 6.

And it hath been holden, that he who keeps several draughts in a parish, is bound to send a team for each draught, whether he occupy any land in the parish or not. 1 Haw. 204.

3. And by the 1 Geo. 2. cap. 13. Every person for every ploughland that they shall occupy, and every person keeping a draught or plough, and so in proportion for every part of a ploughland, draught, or plough, so as it be not less than one fourth part, estimating one car and horse to be equal to two men, shall find and send at every day and place to be appointed for the amending of the highways, &c. according to the intent of this act, one cart with two horses and two men, or two cars with wheels and two men, and in such places where wheel-cars are not used, three slide-cars and two men, or three horses with cleaves with two men, which cars shall be either

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boxed or fitted with sufficient baskets or conveniencies to carry gravel or other necessities for the repair of such highways, &c. to be allowed by the director or overseers, there to work during the said six days, if required by the said overseers, for eight hours in every day, and such cars and horses, or horses with creels or cleaves, shall be deemed as sufficient as if such persons had sent one wain or cart with oxen or horses as by the statute 11 Jac. 1. cap. 7. is directed. *sect. 4.*

4. And if the said carriages shall not be thought needful by the surveyor, then the person that should have sent such carriage, shall for every carriage so spared, send two able men. 11 Jac. 1. cap. 7. *f. 2.*

5. And every other houtholder, and also every cottager, and labourer able to labour, and being no hired servant by the year, shall by themselves, or one sufficient labourer for every of them, work on the said days. 11 Jac. 1. *c. 7. f. 2.*

6. Also every herd, grass-keeper, shepherd, and bailiff, not being a menial servant living in the house of their master, shall by himself or some sufficient labourer perform the six days labour, in such manner as other houtholders, cottagers, or labourers, are obliged to do. 1 Geo. 2. cap. 13. *sect. 5.*

But no day labourer shall be compellable to work without hire at any high road, and where a number of day labourers live in a village, and hold several acres of land, they shall be charged by the overseers of highways, only for the land which they hold. 33 Geo. 2. cap. 8. *sect. 2.*

V. Providing materials.

Surveyor may
take and carry
away rubbish.

1. The surveyor may take and carry away of the rubbish or smallest broken stones of any quarry within the parish, without licence, controulment, or impeachment of the owner, so much as he shall judge necessary for repairing the ways. 11 J. c. 7. *f. 3.*

But he may not cause any rubbish to be digged out of a quarry, but only shall have such as shall be found there ready digged by the owner or his order. *f. 4.*

May gather
stones.

2. And for default of any quarry, not being within his limits, or in default of rubbish not to be found there, he may gather stones lying upon any grounds within the parish, and meet to be used for such purpose; and thereof take and carry away so much as by his discretion shall be thought necessary to be employed in the amendment of the highways. 11 J. c. 7. *f. 3.*

May dig for
gravel.

3. Likewise in default of such quarry, or in default of such rubbish in any such quarry, he may in the several ground of any person within his limits, and nigh adjoining to the highway, and wherein gravel, sand, or cinders are likely to be found, dig or cause to be digged for them. 11 J. c. 7. *f. 3.*

But he may not dig for the same in any man's house, garden, orchard, or meadow. *id. f. 4.*

Nor shall he cause any more pits to be digged for gravel, in any several and inclosed ground than one only, nor shall the pit be in length or breadth above ten yards over; and he shall within a month cause the pit to be filled with

with earth at the costs of the parishioners; on pain of forfeiting to the owner of the soil, five marks, to be recovered by action of debt. *id.*

f. 4. Whereas by several acts of parliament already made for repairing roads, power is given to the surveyors to dig gravel out of the grounds of any persons not being a garden, &c. to be made use of for repairing the said roads; nothing in the said acts shall extend to prevent or obstruct surveyors of roads from digging and taking gravel, sand, and stones, making satisfaction for the same according to the said acts, out of any garden or ground used for a potatoe-garden. 11 G. 2. c. 17 *f. 10.*

VI. Concerning the six days work.

1. By the act, 1 G. 2. c. 13. The overseers may appoint the times and places when and where the six days labour shall be employed, so as the time to be appointed by them be between the last day of *April* and first day of *August*, and may by writing under their hands directed to the respective constables of the several parishes, require the several persons therein named to attend them at the times and places therein mentioned, to perform the six days labour according to the aforesaid statute. 11 *Jac. 1.* Time for repairing.

2. And if any constables shall neglect duly to summon the several persons named in such order, every constable so offending shall forfeit for every neglect, a sum not exceeding twenty shillings. Constables.

3. And every person so summoned who shall fail by himself or by a sufficient labourer in his place, to attend according to such order and to work during the time aforesaid, shall forfeit for every such offence one shilling for every day he shall so neglect, and every person who ought to send carts, cars, or horses, and being duly summoned shall fail to send the same, or if being sent or brought they shall not work during the time aforesaid, shall forfeit for every cart with two horses and two men four shillings for every day he shall so neglect, and for every car with one man two shillings *per* day, and for every three slide cars and two men, or three horses with creels or kishes and two men, four shillings *per* day, and proportionably for every horse or man neglected to be brought or sent or not working as aforesaid. Neglecting to attend.

4. And they shall work eight hours each day, unless they be otherwise licensed by the surveyor. 11 *Jac. 1. c. 7. f. 2.*

5. Provided that if the overseers or director shall agree with any of the persons bound to do six days labour, to do any certain portion of the work in lieu of the six days labour for that year, which they are hereby impowered to do, the persons performing the work so agreed on, to the good liking of the overseers or director, shall be discharged from any further work during the rest of the said six days. Agreements.

6. And by the act, 33 G. 2. c. 8. Where any such agreement shall be made, and the persons so agreeing shall, for ten days, to be computed from the time he so agrees to finish the said work, neglect to perform the same effectually, pursuant to his agreement, in such cases the overseers shall hire labourers, horses, and carriages, to do the work so neglected to be done, and Neglect of work.

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and by warrant under the hand and seal of a justice of the peace, to levy by sale of the offenders goods, (rendering the overplus) such sums as shall be proved to such justice upon oath, (which oath the said justice is hereby empowered to administer) to have been expended in the hire of such labourers, horses, and carriages.

Provided that it be at the same time proved before such justice, that such work is effectually done.

Complaint of neglect.

7. By the act, 1 G. 2. c. 13. s. 8. Upon complaint made by the director, or by the overseers to one of the neighbouring justices of the peace of any of the offences aforesaid, and proved by the oath of such director, overseer, or some other credible witness, such justice upon such complaint and oath made shall by his warrant call the offenders before him, and on default of appearance or on conviction shall cause the respective penalties to be levied by sale of the offenders goods.

Committal.

8. And if such offenders have not sufficient goods whereout the penalties may be levied, the justice before whom such complaint shall be made is required to commit such offenders to the county gaol, there to remain without bail or mainprize, until they shall pay the fines for which they shall be so committed, or to send such offenders to the house of correction, there to remain for any time not exceeding fourteen days.

Time for complaint.

9. Provided such complaint be made within forty eight hours after the respective offences are committed; and if the said director or overseers respectively, shall neglect to complain within the time aforesaid of the offences aforesaid which shall be committed by any persons under their direction, and of which they shall have due knowledge, such director or overseers so offending therein, and being thereof convicted before one justice of the peace, shall for every such offence forfeit twenty shillings, to be levied and raised in such manner as the before mentioned penalties are directed to be levied, so as proof of such omission be duly made upon oath within twenty days after.

But by the act, 33 G. 2. c. 8. The time for making such complaint, is enlarged to ten days from the time of the offence committed.

Complaint against overseers.

10. Upon complaint upon oath, before two neighbouring justices of the peace, that the overseers have neglected to execute the laws for the repair of highways, such justices are empowered, by summons under their hands and seals, to require the personal attendance of such overseers, at a time by them to be appointed to enquire into such neglect, and in case the same be proved upon oath, or the said overseers shall, being duly served, refuse to attend, or persist in such neglect, in such case the said justices may fine such overseers for such neglect, in any sum not exceeding three pounds, and shall cause the same to be levied by distress and sale of the offenders goods, (rendering the overplus). *Ibid.* Sect. 7.

Fines disposed of.

11. Which fines, when levied, shall be laid out by such justice, on the repair of the roads in the parish for which such overseers were appointed; provided that nothing herein contained shall alter the penalties prescribed, by the laws in being, for overseers refusal to take on them their office when appointed.

12. When

12. When any parish has not any highway through the same, the inhabitants of such parish shall be liable to work in the next adjacent parishes wherein there shall be any considerable highway leading to any city or market, according to such proportion as shall be ordered by the presentment of the grand jury, and confirmed by the judges or justices of the peace at the assizes or sessions, so as such work shall not exceed the six days labour.

9 Ann. c. 9. s. 3.

Provided that no person shall be obliged to go above two miles beyond the confines of the parish wherein he shall dwell, to work at any highway. s. 4.

13. In such parishes where the common labourers are found not to have fitting tools for the work required, to wit, iron crows or bars, or other tools necessary to be employed in the repair of the highways, the justices of peace in open session, or in failure thereof the two next justices of the peace, shall assess and raise a sum not exceeding forty shillings, upon the inhabitants of such parishes, in such proportions as to such justices shall seem proper, for the buying such tools, which shall be kept by the surveyor of the highways, and delivered over from time to time to such person as shall succeed such surveyor, to be kept for the use of the said parish, and not made use of in any other work, the said sums of money in default of payment thereof, to be levied by warrant of such justices by distress and sale of the goods of such inhabitants, who shall make default in payment of their proportion thereof. s. 5.

14. And by the 1 G. 2. c. 13. All parish tools provided for the repairing the highways shall be kept in some convenient publick place belonging to each parish, and such tools shall be repaired and kept in order at the expence of each respective parish. s. 11.

VII. Of annoyances in general.

1. There is no doubt, but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act, which will render it less commodious to the king's people, are publick nuisances at common law. 1 Haw. 212.

2. And by the common law any one may abate a nuisance in a highway, and remove the materials, but not convert them to his own use. 1 Haw. 214.

3. Also it seemeth, that an heir may be indicted for continuing an incroachment, or other nuisance to a highway, begun by his ancestor; because such a continuance thereof amounts in the judgment of law to a new nuisance. 1 Haw. 214.

VIII. Ditches adjoining to the highway.

1. To suffer the ditches adjoining to a highway to be fowl, by reason whereof it is impaired, is a nuisance at common law. 1 Haw. 212.

2. And

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2. And it is said, that he who hath lands next adjoining to a highway, is bound of common right to scour his ditches: But it is said, that he who hath lands next adjoining to such lands, is not bound by the common law so to do, without some special prescription for that purpose.

1 *Haw.* 213.

Scouring ditches.

3. No persons having any ground adjoining to any highway, or common fairing way leading to any market town, shall scour any ditch and throw the soil thereof into the highway, and suffer it to lie there by the space of six months, to the annoyance of the said highway, upon pain of forfeiture for every load of soil so cast into the highway, twelve pence.

11 *J. c.* 7. *f.* 7.

4. And where any heretofore have been so cast into the highways, that there is a bank between the said way, and ditch, it shall be lawful for the supervisors and workmen appointed for the amendment of the said highways to make sluices, or other devices by their discretions, to convey the water out of the said way into the ditch. *Ibid.*

5. The occupiers of all lands which are bounded by highways and keshes, shall at their own charge keep the ditches cleansed and open for waters to pass, and also the passages out of such ditches through the banks thereof to the adjacent lands where there can be made such passage for the water, and as often as there shall be any stoppage in such ditches or passages to open the same. 9 *Ann.* c. 9. *f.* 7.

Neglecting to cleanse ditches,

6. And if any such occupier of lands, where such stoppage is, neglect so to do within two days after notice given by the overseers of that road, the said overseers shall set labourers to work in cleansing the said ditches and passages.

And in case such occupier so neglecting shall refuse to pay the said labourers, the next justice of the peace is required to grant his warrant to any constable, to distrain so much of the goods of the offender as will pay the said labourers, and to dispose of the same.

7. Provided that nothing herein contained shall extend to oblige the occupiers of any bog through which ditches or toghers have been made at the expence of the publick, to scour or cleanse such ditches. *f.* 8.

Proprietors of marshy grounds.

8. Every proprietor of low and marshy grounds through which any new road hath been or shall be made by public money, except turnpike roads, shall every third year scour the trenches so as the water may be carried off.

13 *G. 2.* c. 10. *f.* 5.

And in default thereof any two justices of the peace of the county where such roads lie, may send such proprietor notice in writing to scour such trenches in six calendar months after the date of such notice, which if the said proprietor shall omit, the said justices may by warrant under their hands, order the overseers of the parish wherein such road is, to have the said trenches effectually scoured, and levy the value of the said work on the proprietors goods, to be applied to the discharge of the work, deducting such reasonable charge to the overseers as the justices aforesaid shall think fit, not exceeding two shillings and six pence for each day such overseers shall necessarily be employed in attending the work.

IX. Hedges adjoining to the highway.

1. It seemeth clear, that it is a nuisance at common law, to suffer the boughs of trees growing near the highway, to hang over the road in such a manner, as thereby to incomode the passage. 1 Haw. 212.

2. And perhaps it is the better opinion, that he who hath trees next adjoining to the highway, and hanging over it to the annoyance of the people, is bound by the common law to lop the same; and it seems clear, that any person may justify the lopping such trees, so far as to avoid the nuisance. 1 Haw. 213.

3. All hedges of white-thorn, black-thorn, sally, hazel, furz, and holly, growing on either side of any highways, which are not turnpike-roads, shall be cut at a height not exceeding five feet by the owner or occupier of the ground which shall be inclosed with the hedges, except such inclosures of gardens, orchards, nurseries, and hop-yards. 13 G. 2. c. 10. s. 7. Cutting hedges

4. And upon neglect thereof for fourteen days after notice in writing given for that purpose under the hand of the overseers to be appointed by the parish or grand jury, which notice such overseers are required to give where the same is requisite, it shall be lawful for such overseers to cut down such hedges except as aforesaid, according to the height aforesaid. Neglect after notice.

5. The charges whereof shall be reimbursed the overseers, by such owner or occupier his or her executors or administrators, by warrant of any justice of the peace for such county.

6. And if any overseers shall neglect their duty herein, they shall forfeit ten shillings for every default, the said penalty to be recovered by civil bill by any person who shall first sue for the same.

7. Provided that no notice shall be given to cut any hedges, but between the twenty ninth day of *September* and the twentieth day of *February* in each year. s. 8. Time for giving notice.

X. Straw, dung, stones, rubbish, laid in the highways.

1. There is no doubt, but that all obstructions by laying straw, dung, stones, logs of timber, and the like, in the highway, are nuisances at common law. 1 Haw. 212.

2. And it seemeth to be clear, that it is no excuse for one who layeth such logs in the highway, that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs: yet it is said to be no nuisance for the inhabitants of a town to unlade billets, and the like, in the street before their houses, by reason of the necessity of the case, unless they suffer them to continue there an unreasonable time after they are unloaded. 1 Haw. 212.

3. By the 29 G. 2. c. 13. s. 6. If any straw, litter, dung, muck, mooring, rubbish, ashes, or filth, shall be laid and remain for three days upon any highway or road within seven miles of the city of *Dublin*, to be computed Filth cast in highways.

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puted from the Tholsel of the said city, at the rate of two thousand two hundred and forty yards to the mile; or if any stones, clay, mould, or gravel, shall be dug, gathered, or scraped off the same, without the direction first had of the overseers of such highway for the time being, for the actual repair thereof, upon information given, and oath made thereof by one credible witness, before one justice of the peace for the city, county, or county of the city wherein such offences shall be committed, who are required to administer such oath, the persons committing said offence, shall forfeit twenty shillings, to be levied by distress and sale of their goods, by warrant under the hand and seal of said justices, rendering the overplus (if any be) to the owner, the charges in taking and disposing of the said goods being first deducted, the said twenty shillings to be paid to the persons who shall give the information aforesaid.

Penalty of 20 s.

Fine of three pounds.

4. If any person shall lay any dung or filth on any highroad, or shall scrape the gravel off any road, such persons may be fined by any justice of the peace, in any sum not exceeding three pounds for every such offence, which fine shall be levied by the warrant of such justice under hand and seal, off the goods of the offender, (rendering the overplus). 33 G. 2. c. 8. s. 12.

5. And the fines when levied, shall be paid to the parish overseers, to be laid out on the roads, or in abating any nuisance on roads in their parish, and shall be accounted for as money presented by grand juries for highways.

XI. Gate erected across the highway.

A gate erected in a highway, is a common nuisance, because it interrupts the people in that free and open passage which they before enjoyed, and were lawfully intitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy. 1 Haw. 199.

XII. Encroachments on the highways.

1. No wall, cabbin, or ditch, shall hereafter be built or made nearer to the center of any highroad than fifteen feet. 33 G. 2. c. 8. s. 10.

2. If any person shall dig any pit or ditch, or build any wall or cabbin, or make any enclosure on any road, such persons may be fined by any justice of the peace, in any sum not exceeding three pounds for every such offence, which fine shall be levied by the warrant of such justice under the hand and seal, off the goods of the offender, (rendering the overplus). s. 12.

3. And the fines when levied, shall be paid to the parish overseers, to be laid out on the roads, or in abating any nuisance on roads in their parish, and shall be accounted for as money presented by grand juries for highways.

XIII. Nu

XIII. Nuisance by unlawful breadth and tire of wheels.

1. No cart or waggon, having the fellies of the wheels thereof of a less breadth or gage than seven inches, when worn, from side to side, at the foal or bottom of the wheel, shall be drawn with more than one horse or beast of draught, in or through any of the streets or lanes in the city of *Dublin*, or suburbs thereof, or liberties thereunto adjoining, or through any of the highways or roads in the county of the said city, or county of *Dublin* within seven miles of the said city, to be computed from the *Tholsel* of the said city, and at the rate of two thousand two hundred and forty yards to the mile. 29. G. 2. c. 13. s. 1. Breadth of wheels.

2. And every owner or driver of such cart or waggon, not having the fellies of the wheels thereof the breadth or gage of seven inches, when worn, from side to side, at the least, at the foal or bottom of the wheel, with more than one horse or beast of draught, shall forfeit all such horses or beasts of draught, except the shaft horse or beast of draught. in such cart or waggon, with all geers, bridles, halters, and accoutrements, to the sole use and benefit of any person who shall seize and distrain the same. Drawn by more than one beast.

3. Provided that whatever person shall make any such seizure or distress, shall deliver the horses or beasts of draught, and other things so seized or distrained with all convenient speed into the custody of the constable, pound-keeper, or some other parish officer of the same or next adjacent parish or liberty where such distress or seizure is made. s. 2. Distress to be impounded.

4. Which constable, pound-keeper, or parish officer, are hereby required to receive into their custody, and safely to keep the same, upon pain of forfeiting to the persons so seizing the same, forty shillings; to be levied and recovered in such manner as the other penalties by this act are particularly directed and prescribed to be levied, until the persons who made such distress or seizure shall make proof upon oath before some justice of the peace, of the offence committed; and the said justices before whom such proof is made, are required to issue their precept to such constable, pound-keeper, or parish officer, immediately to deliver the horses or beasts of draught, and other things so forfeited to the parties who seized or distrained the same, to their sole benefit, paying such reasonable charge for keeping and securing the same, as the said justices shall direct. Constable, &c. neglecting.

5. If any persons shall hinder or endeavour to obstruct the taking or carrying off any such seizure or distress, or thing so to be seized or distrained for the aforesaid offences, or shall rescue the same, or shall use any violence to the persons concerned in making such seizure or distress; every such person shall, upon due proof made upon oath, by one credible witness before any justice of the peace for the county, city, or county of the city, where such offence is done, be committed by such justice to the common gaol for the said county for one month, without bail or main-prize. s. 3. Rescue of distress.

Forfeiture of
ten shillings.

6. And shall also forfeit for every such offence ten shillings to the persons who shall be so obstructed, or attempted to be so obstructed, in making such seizure or distress, or in taking or carrying off the same, to be levied by distress and sale of the offenders goods and chattels, by warrant under the hand and seal of such justice who is required to grant the same.

Six days for
seizing, &c.

7. And in case the said penalty be not paid within three days after such distress made, then it shall be lawful for the persons so distraining to sell the goods so distrained, rendering the overplus to the owners, the charge of such distraining and selling being first deducted.

8. Every person who shall offend as aforesaid, being thereof convicted as aforesaid, shall be subject to the respective penalties and forfeitures aforesaid, to be levied and applied in such manner and to such uses as aforesaid, and their horses, beasts of draught, with their geers, bridles, and accoutrements, shall for six days next after such offence, remain liable to such seizures and distresses, and for the use of such persons as they would have been, had they been seized or distrained in the fact, during the commission of such offence. *f. 4.*

Country carri-
ages.

9. Provided that nothing herein contained, shall extend to prohibit, or restrain the driving, travelling, or making use of any cart or waggon, or subject any person to the forfeiture and seizure of any horses, or beasts of draught, or geers, bridles, or accoutrements belonging to the same, or any of the penalties aforesaid, where such cart or waggon is going or travelling to or from the said city of *Dublin*, or to or from any distant place above seven miles from the said city, to be computed as aforesaid. *f. 5.*

Breadth of car-
wheels.

10. And by the 33 G. 2. c. 8. No cart, car, dray, or waggon, having the wheels thereof of a less breadth or gage than three inches, when worn from side to side, at the sole or bottom of the wheel, shall be used, or travel through or upon any highway; and every owner or driver of such cart, &c. not having the wheels thereof of the breadth or gage aforesaid, shall forfeit forty shillings for every such offence, to the persons seizing the same; for recovery whereof, it shall be lawful for any persons to seize such horses and beasts of draft in such cart, &c. with all the geers, bridles, and accoutrements thereto belonging, and with all convenient speed deliver the same into the custody of the constable, pound-keeper, or parish officer of the same, next, or adjacent parish or liberty where such seizure shall be made, who are required to receive or retain the same for twenty four hours, unless sooner delivered by virtue of a warrant from one or more justices of the peace, in manner herein after directed. *f. 16.*

Seizure of
horses, &c.

Oath to be
made of the
offence.

11. Provided that the persons so seizing the same, shall within twenty four hours, make oath before some justice of the peace of the said offence, and the said justice being satisfied that such offence has been committed, shall issue his warrant, under his hand and seal, directed to the constable, pound-keeper, or parish officer in whose custody such horses or beasts of draft then remain, requiring him to deliver the same unto the persons named in such warrant, the first paying to such constable, &c. one shilling for each horse or beast of draft, for his care and trouble in detaining the same, for the sole use and benefit of the persons named in the said warrant. *f. 17.*

12. Unless the persons to whom such horses and beasts of draft belonged at the time of such seizure, shall, before the delivery of the same, pay to the persons named in the said warrant, forty shillings, on payment whereof the said constable, &c. shall deliver over the said horses or beasts of draft, with all their geers and accoutrements, to the persons from whom they were seized, they paying the said constable, &c. one shilling for each horse or beast of draft, for his care and trouble in keeping thereof.

13. If any person shall hinder, or endeavour to obstruct the seizing or carrying off any such seizure or distress for the aforesaid offences, or shall rescue the same, or shall use any violence to the persons concerned in making such seizure or distress, every such person shall, upon due proof made upon oath, by one credible witness before any justice of the peace for the county, city, or county of the city where such offence is done, be committed by such justice to the common gaol of said county, for one month without bail or mainprize, and shall also forfeit for every such offence forty shillings, to the persons who shall be so obstructed in making such seizure or distress, or in taking or carrying off the same, to be levied by distress and sale of the offenders goods. *f. 18.*

14. The streaks or tires of iron with which the wheels of any cart, car, dray, or waggon, are bound, shall be set and fastened on with rose or broad flat headed nails, and not spriggs, and every owner or driver of any cart, &c. the streaks or tires of iron whereof shall not be set or fastened on with rose or broad flat-headed nails, and not spriggs, shall forfeit forty shillings for every time such cart, car, &c. shall be used; or travel through or upon any highway, to the persons who shall inform of the same, to be levied by distress and sale of the offenders goods, in such manner as herein before-mentioned. *f. 19.*

15. Whosoever shall draw any mill-stone through any public road, shall support and keep the same from touching the ground; and if any person shall draw any mill-stone through any public road in any other manner, it shall be lawful for any person to stop the same upon such road, and to drive the horses that draw the same unto the next pound, and there to keep them until the owners or conveyers of such mill-stone shall provide proper carriage for carrying away the same in manner as is before mentioned, or pay unto one of his Majesty's justices of the peace within the county where such mill-stone shall be stopped, five shillings towards keeping the public roads in good repair. *1 Geo. 2. cap. 13. sect. 28.*

XIV. Breadth and widening of the highways.

1. All highways, &c. hereafter to be set out, shall be at least thirty foot broad in the clear, exclusive of the ditches; and all roads already inclosed which are not of the breadth of twenty one feet in the clear, shall upon the presentment of the grand jury and order of the judges of assize thereon, be enlarged to the breadth aforesaid, and the inclosures which hinder the same be thrown down and abated by the sheriff of the county as nuisances. *1 G. 2. c. 13. f. 19.*

2. Provided

2. Provided it appear to such grand jury, by the oaths of two substantial and credible persons, that the said roads are not of the breadth of twenty one feet in the clear, as aforesaid.

3. And provided also, that the persons whose inclosures are to be thrown down and abated as aforesaid, have due notice of such presentment, and a copy thereof within six weeks after such presentment made, and that such presentment be not confirmed until the ensuing assizes after such notice given.

Widening old roads.

4. And by the 33 G. 2. c. 8. s. 10. Two justices of the peace may, upon the application of the overseers of any parish, order, by writing under their hands and seals, any old road which is not twenty one feet wide in the clear, to be widened to that breadth.

5. Except where such road is inclosed on each side by walls five feet high or more, built of lime and stone, or brick, and the expence of widening any road as aforesaid, shall upon due proof thereof by affidavit, be levied by presentments of the grand jury at the assizes, off the barony through which said roads run.

No presentment for roads under 21 feet wide.

6. No money shall be granted by the presentment of the grand jury for any old road, unless the affidavit on which the presentment is to be founded sets forth, that such old road is to be of the breadth of twenty one feet between enclosure and enclosure, and to be made fourteen feet wide at least, with stone, sand, or gravel, and no money shall be granted for any new road, unless the affidavit sets forth, that the said road is to be thirty feet wide in the clear, and to be made with stones, sand, or gravel, of the breadth of fourteen feet wide at least. s. 11.

XV. *Presentment or indictment (D) of highways in general.*

It is no excuse for the inhabitants of a parish, being indicted at common law, for not repairing the highways, that they have done all that is required of them by statute; for since these statutes are wholly in the affirmative, and made in aid of the common law, and to supply the defects thereof, they shall not be construed to abrogate any provision thereby made for these purposes. 1 Haw. 204. So that at all events, the parish may be compelled to make their ways good.

Must shew it to be a highway.

2. And the indictment must shew, that the way is common to all the king's people; for which cause it hath been resolved, that an indictment for a nuisance to a horseway, without adding that it is a highway, is naught. 1 Haw. 220.

Note; The expression for *the king's highway*, when the indictments were in *Latin*, was *alta via regia*; which a modern author, in his form of an indictment, translates *a royal highway*.

Must shew the places from and to which it leads.

3. It is safest in the indictment to shew both the place from which, and also the place to which the way supposed to be out of repair doth lead; yet exceptions for want of such certainty have sometimes been disallowed: however it seems certain, that there is no necessity to shew that a highway leads to a market town, because every highway leads from town to town. 1 Haw. 219.

4. It

4. It is necessary in the indictment expressly to shew, in what place the nuisance complained of was done; for which cause an indictment for stopping a way at *D.* leading from *D.* to *C.* is not good, for it is impossible that a way leading from *D.* should be in *D.* and no other place is mentioned. *1 Haw. 219.* Place where.

5. It is said, that a presentment that a highway in such a place is decayed, by the defaults of the inhabitants of such a town, is good, without naming any person in certainty. *1 Haw. 220.* Need not name the inhabitants.

6. But it hath been adjudged, that an indictment against particular persons, must specially charge them every one. *1 Haw. 220.* Indictment against particular persons.

7. It ought also certainly to shew, to what part of the highway the nuisance did extend, as by shewing how many foot in breadth it contained, or otherwise the defendant will neither know of the certainty of the charge, against which he is to make his defence, neither will the court be able from the record to judge of the greatness of the offence, in order to assess a fine answerable thereunto; and it hath been resolved, that the place is not sufficiently ascertained by shewing, that it contained so many foot in length, and so many in breadth, by estimation. *1 Haw. 220.* Must set forth how much is out of repair.

8. Also, the fact must be expressed in such proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, that a presentment for diverting a highway is not good, because a highway cannot be diverted, but must always continue in the same place where it was, howsoever it may be obstructed, and a new way made in another place. *1 Haw. 220.* Must set forth the fact clearly.

9. It seems to be implied in the construction of all penal statutes, that no one ought to be convicted of any offence against them without having notice of the accusation made against him, and an opportunity of defending himself. And therefore it seems certain, that generally no one ought to be punished for any of the abovementioned offences, without being called upon to answer for himself, and having liberty to traverse the matters alledged against him. *1 Haw. 219.* Persons indicted to have notice.

10. Upon an indictment against a parish for not repairing, they can give nothing in evidence upon the plea of not guilty, but that the way is in repair; but if it be against a particular person, he may give evidence that others ought to repair it. *3 Salk. 183. Comb. 396.* Plea of not guilty.

11. And the defendants ought not to plead that they ought not to repair, without shewing who ought. *1 Haw. 220.* Plea to charge others.

12. And Mr. *Hawkins* says, that if a particular person be bound to repair a highway, either by inclosure or by prescription, the parish cannot take advantage of it upon the plea of not guilty, but ought to set forth their discharge in a special plea. *1 Haw. 203.* Special plea.

13. After conviction, or upon a demurrer, or confession, any one may take exceptions to such indictment or presentment in any court for the want of legal form; but the court in discretion will very rarely suffer a man to take such exceptions, before such conviction or confession, without a certificate and affidavit that the ways are in good repair. *1 Haw. 219.* Exceptions to the form of the indictment.

14. And the defendants shall not be discharged by submitting to a fine, but a *distringas* shall go in infinitum till they repair. *1 Haw. 220.* Fine no discharge.

XVI. *Power of the justices to punish offences.*

1. All justices of assize, justices of oyer and terminer, and justices of the peace in their sessions, and stewards of leets and law days, in their leets and law days, shall inquire of and determine every offence, matter, and cause, that shall arise by reason of this statute, and assess reasonable fines and amerciaments for the same. 11 J. c. 7. s. 8.

2. And every penalty or sums of money forfeited or to be imposed for any cause within this statute, shall be levied in every parish by the surveyors of the ways within that parish, by distress and sale of the distresses, in manner as fines and amerciaments in leets have been used, and the money so levied to be employed upon the highway or common fairing way where the offence was committed, within one year.

3. And by the 4 An. c. 6. s. 6. It shall be lawful for any two justices of the peace living in the same barony, or the adjacent barony where the offence is committed, to hear and determine summarily, the offences against *the act for the mending the highways by six days labour*.

4. And the said justices by warrant under their hands and seals, may levy the penalties in the said law imposed, by distress and sale of the goods of such offenders; the said penalties to be applied to the repair of the highways, and the overplus to be restored to the owner, and such justices are to account for what they shall so levy at the next assizes to be held for that county.

XVII. *Turnpikes.*

Permitting a
passage to avoid
a turnpike.

1. By the several particular turnpike acts, if any person occupying any land near unto any turnpike, shall willingly permit any persons to pass through any way, to avoid the payment of the toll, and be thereof convicted upon oath before one justice of the peace for the county wherein such offence shall be committed, who are required to administer such oath, every such person shall forfeit to the trustees authorized to put such act in execution, ten shillings, to be levied by distress and sale of the offenders goods, by warrant under the hand and seal of the said trustees, or of such justice, rendering the overplus, if any, to the owner, the charges in taking and disposing of the said goods being first deducted.

Treasurers ne-
glecting to
make payments,

2. In case the treasurers or collectors of the tolls, shall not make such account and payment unto such persons, according to the orders of the said trustees, then the said justices of the peace, at any special sessions or meeting of them, to be holden for the county in which such receivers or collectors have acted or been employed and made such default, are hereby required to make enquiry, and finally to determine concerning such default, as well by confession or examination upon oath of the said parties themselves, as by the testimony of one or more credible witnesses upon oath, which oath they are hereby required to administer without fee.

Committal.

3. And if any person shall be convicted thereof by such justices, the said justices shall upon conviction, commit the parties to the common goal of the county where such offence shall be committed, there to remain without bail or

or mainprize, until they shall have made a true and perfect account and payment as aforesaid.

4. It shall be lawful for the said surveyors, and such persons as they, or the said trustees shall appoint, to dig, raise, gather, and take any gravel, furze, sand, stones, or other materials out of the several grounds of any persons not being a garden, orchard, or deer-park, yard, planted-walk, or avenue to a house, where any such materials may be found, and from time to time to carry away so much thereof, as the said surveyors in their respective places shall adjudge necessary for the repairing and amending the said roads, paying such rate for such materials, and for the damage, to the owner or occupier of the ground from which the same shall be digged, raised, gathered, and carried away, as the trustees shall adjudge reasonable.

Taking materials for roads.

5. In case of any difference between such owner or occupier, and the said trustees, touching the value of the materials and damage aforesaid, the judges of assize, or the justices of the peace, at the next general assizes and general goal delivery, or quarter sessions to be holden in the county where the said materials shall be digged, raised, or gathered, and from which the same shall be carried away, may and shall adjudge, assess, and finally determine the same.

Adjusting differences.

6. And in case any such owner or occupier of the grounds where such materials may be had, or any other person shall oppose or hinder the persons so authorized, in searching for, raising, digging, or carrying away any gravel, furze, sand, stones, or other materials, every such person so offending, being thereof convicted upon oath before one or more justices of the peace for the said county where such offence shall be committed, shall for every such offence forfeit twenty shillings, to be paid to the said trustees, and levied by distress and sale of the said offenders goods and chattles, in such manner as the penalties herein before mentioned are appointed to be levied.

Opposing persons authorized, &c.

7. It shall be lawful for the surveyors, and such persons as they, or the said trustees shall appoint, to remove and prevent any annoyances on any part of the said roads hereby intended to be repaired by filth, dung, ashes, rubbish, water-courses, sinks, or drains, running into the said roads, and to cleanse any ditch or water-courses adjoining to the said roads, or to cut down, lop, or top any trees or bushes, growing in the said highways, or in hedges or banks adjacent to the said highways, and to take and carry away the same, the owners or occupiers neglecting to cut down such trees or bushes, or to remove such other annoyances for the space of ten days after notice in writing given for that purpose, under the hands of seven of the said trustees, the charges whereof shall be reimbursed the said surveyors, by such owners or occupiers neglecting to cut down the said trees or bushes, or to remove such other annoyances.

Annoyances to be removed.

8. And if after removal of any such annoyances, any persons shall again offend in the like kind, every such person so offending, and being thereof convicted upon oath before one or more justices of the peace for the county where such offence shall be committed, shall for every such offence, forfeit unto the said trustees where such offence shall be committed, ten shillings, to be levied in manner aforesaid.

Penalty of ten shillings.

9. It shall be lawful for the said surveyors, by order of the said trustees, or any of them, to make causeways, and to cut and make drains through

Making drains, arches, &c.

Highways.

Damages to be
assessed.

any grounds lying contiguous to the said roads, and to erect arches of brick, timber, or stone thereupon, and also to widen any of the narrow parts of the said roads, to the breadth of forty two feet in the clear, by opening, clearing, and laying into the said roads, any grounds of any persons lying contiguous to such roads, not being a planted walk or avenue to a house, and also to cause ditches or trenches to be made in such manner, as such surveyors by order of the said trustees shall adjudge necessary, for the better amending and keeping the said roads in good repair, making such reasonable satisfaction to the owner or occupier of such ground, which shall be so laid in or unto the said roads, or through which any such drains shall be cut, or on which any such arches shall be made, for the damages which they shall thereby sustain, as shall be assessed and adjudged, in case the same cannot otherwise be settled by the next going judges of the assizes, or justices of the peace, or the major part of them, at the next general assizes or quarter-sessions holden for the county in which such ground shall be laid into the said roads, and through which any new road, drains, or ditches shall be cut, or on which such arches shall be erected, or such causeways made, in case of any difference concerning the same.

Refusing to
cleanse water-
courses, &c.

10. *And if any owner or occupier of any water-courses or ditches, adjoining to the said roads, shall refuse to scour or cleanse such water-courses, and to make such ditches so deep, and in such manner as the surveyors shall adjudge proper and convenient, after ten days notice shall be given for that purpose by such surveyor, or such persons as shall be appointed by them to such owners, it shall be lawful for the surveyors to set men to work, to scour, or cleanse, or make the same, and by warrant from any seven or more of the said trustees, to levy the charge thereof upon the person's goods or estates of the owners or occupiers of such water-course or ditches, by distress and sale of their goods and chattles, rendering the overplus (if any be) to the owner or occupier, after all charges paid.*

Forcing
through a turn-
pike.

11. *For preventing frauds and abuses, with respect to the toll or duty, if any person shall force their way through any of the said gates without paying such tolls, as by this act he is bound to pay, or if any persons having paid the toll, and having such tickets, as hereby directed, shall give or dispose of the same to any other person, in order to avoid the payment of the said toll, every such person giving, disposing, or offering, and the person receiving such tickets, and being thereof convicted upon oath before the said trustees, or before any one or more justices of the peace for the county wherein such offence shall be committed, shall respectively forfeit ten shillings, to be levied, recovered, and disposed of, as any other penalty or forfeiture is directed by this act.*

A. Information of the default of labourers.

Dublin. **B**E it remembred, that this — day of — A. S. surveyor of the highways of the parish of — in the said county, complaineth and maketh oath, that A. O. of the parish aforesaid in the county aforesaid, labourer, being a person able to labour, and being no hired servant by the year, [or, being an householder, or cottager, as the case shall be] was duly summoned by him the said A. S. by himself or one sufficient labourer, to work

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work and travel, on the ——— day of ——— now last past, in the amendment of the highways at ——— in the parish aforesaid in the county aforesaid, but that he the said A. O. did neglect and make default, and did not by himself nor by one sufficient labourer, work and travel on the said ——— day of ——— in the amendment of the said highways as aforesaid.

Or if he is a person liable to find a wain or cart, then say, ——— that A. O. of ——— yeoman, occupying a ploughland in tillage (or pasture) in the said parish (or as the case shall be;) was duly summoned by him the said A. S. to find and send, on the ——— day of ——— now last past, to work and travel in the highways at ——— in the parish aforesaid in the county aforesaid, one wain or cart furnished after the custom of the country with oxen, horses, or other cattle, and other necessities, meet to carry things convenient for that purpose, and also two able men with the same; but that he the said A. O. his duty in that behalf not regarding, did neglect and make default, and did not find and send one wain or cart furnished as aforesaid with two able men as aforesaid, to work and travel on the said ——— day of ——— in the amendment of the said highways as aforesaid. A. S.

Taken in writing and upon oath before us ——— two of his majesty's justices of the peace for the said county, at our special sessions for the amendment of the highways holden at ——— in the said county, the ——— day of ——— aforesaid, in the year aforesaid.

B. Summons on the foregoing information.

Dublin. } To the constable of ———

WHEREAS complaint in writing and upon oath hath this ——— day of ——— in the year ——— been made before us ——— two of his majesty's justices of the peace for the said county, at our special sessions for the amendment of the highways holden at ——— in the said county, by A. S. surveyor of the highways of the parish of ——— in the said county, that A. O. of ——— yeoman, occupying a ploughland in tillage (or pasture) in the said parish, (or keeping a draught or plough in the said parish, or as the case shall be;) was duly summoned by him the said A. S. to find and send on the ——— day of ——— now last past, to work and travel in the amendment of the highways at ——— in the parish aforesaid in the county aforesaid, one wain or cart furnished after the custom of the country with oxen, horses, or other cattle, and other necessities, meet to carry things convenient for that purpose, and also two able men with the same; but that he the said A. O. did neglect and make default, and did not find and send one wain or cart furnished as aforesaid with two able men as aforesaid, to work and travel on the said ——— day of ——— in the amendment of the said highways as aforesaid: These are therefore to command you forthwith to summon the said A. O. to appear before us at our special sessions for the amendment of the highways

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to be holden at _____ in the said county, on _____ the _____ day of _____ at the hour of _____ to answer unto the said complaint; And also that you do summon A. W. of _____ then and there to appear and testify before us his knowledge concerning the premisses. And be you then there to certify what you shall have done in the execution hereof. Herein fail you not. Given under our hands and seals the _____ day of _____ aforesaid, in the year aforesaid.

C. Warrant of distress thereupon.

Dublin. { To the constable of _____

WHEREAS A. O. of _____ in the county aforesaid, yeoman, is duly convicted before us _____ two of his majesty's justices of the peace for the said county, by the oath of A. W. a credible witness, for that he the said A. O. occupying a ploughland in tillage (or pasture) in the said parish [or, keeping a draught or plough in the said parish, or otherwise as the case shall be] was duly summoned by A. S. surveyor, of the highways of the parish of _____ in the said county, to find and send on the _____ day of _____ now last past, to work and travel in the amendment of the highways at _____ in the parish aforesaid in the county aforesaid, one wain or cart furnished after the custom of the country with oxen, horses, or other cattle, and other necessities meet to carry things convenient for that purpose, and also two able men with the same; but that he the said A. O. did neglect and make default, and did not find and send one wain or cart furnished as aforesaid, with two able men as aforesaid, to work and travel on the said _____ day of _____ in the amendment of the said highways as aforesaid, whereby he hath forfeited the sum of 10s. These are therefore in his said majesty's name to command you, to levy the said sum by distress of the goods of him the said A. O. And if within the space of [five] days next after such distress by you taken, the said sum of 10s. together with reasonable charges of taking and keeping the said distress shall not be paid; that then you do sell the said goods so by you distrained as aforesaid, and out of the money, arising by such sale, that you do pay the said sum of 10s. to him the said A. S. who informed us of the said offence, and sueth before us for the forfeiture aforesaid; returning to him the said A. O. the overplus upon demand, the reasonable charges of taking, keeping, and selling the said distress being first deducted. Herein fail you not. Given under our hands and seals at our special sessions for the amendment of the highways, holden at _____ in the said county the _____ day of _____ in the _____ year of _____.

D. In-

D Indictment for not repairing a common highway.

Dublin. **T**HE jurors for our lord the king upon their oath present, that from the time whereof the memory of man is not to the contrary, there was, and yet is a common and antient king's highway leading from the town of _____ in the county of _____ towards and unto the market town of _____ in the county of _____, used for all the liege subjects of our said lord the king, and for his predecessors, with their horses, coaches, carts, and carriages to go, return, pass, ride, and labour at their will and pleasure, and that a certain part of the same king's common highway called _____ situate, lying, and being in the parish of _____ in the county of _____ aforesaid, containing in length _____ feet, and in breadth _____ feet, on the _____ day of _____ in the _____ year of the reign of _____ and continually afterwards, until the day of the taking of this inquisition, was and yet is in great decay, for the want of due reparation and amendment of the same; so that the subjects of our said lord the king, passing and travelling through the same, with their horses, coaches, carts, and carriages, could not during the time aforesaid, nor yet can go, return, pass, ride, and labour, without great danger; to the great damage and common nuisance of all the liege subjects of our said lord the king, passing through that way, and against the peace of our said lord the king, his crown and dignity; and that A. O. of _____ aforesaid, gentleman, ought by reason of the tenure of his lands and tenements, situate, lying, and being at _____ aforesaid, in the county aforesaid, to repair and amend the said highway, when and so often as it shall be necessary.

Or, that the inhabitants of the said parish of _____ in the said county of _____ the common highway aforesaid (so as aforesaid being in decay) ought to repair and amend, when and so often as it shall be necessary.

Indictment for laying obstructions in the highway.

Dublin. **T**HE jurors of our lord the king upon their oath present, that A. O. late of _____ in the county aforesaid, yeoman, on the _____ day of _____ in the _____ year of the reign of _____ and on divers other days and times as well before as afterwards, with force and arms, at _____ in the said county, in and upon the king's common highway there, leading from _____ unto the town of _____ caused to be put and placed, as is aforesaid cast up, set, and erect great quantity of dung and other filth, by reason whereof, divers hurtful and unwholsome smells from the said dung and other filth did then and there arise, and thereby the air there became, was, and is corrupted and infected from the aforesaid _____ day of _____ in the _____ year aforesaid, until the day of exhibiting this information, in and upon the king's common highway aforesaid to be, lie, and remain, bath permitted and doth still permit, to the grievous and common nuisance of all the lieges and subjects of the said lord the king, upon.

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upon and through the king's common highway aforesaid going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity. Trem. 197.

Or, ——— cart loads of rubbish ——— by reason whereof the said highway for the whole time aforesaid was straitned and obstructed, so that the liege subjects of our said lord the king could not so freely pass and repass about their lawful business, through the said common highway there, as they ought and have been accustomed ———.

Indictment for incroaching upon a highway, by building there-upon.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of ——— carpenter, the ——— day of ——— in the ——— year ——— with force and arms, at, ——— in and upon a common highway, in a certain place commonly called ——— there leading from ——— to ——— by a certain building there, containing in length ——— feet, and in breadth ——— feet, by him the said A. O. erected and built, hath unlawfully and unjustly incroached, and doth yet incroach, and the building aforesaid so as is aforesaid erected and built by him the said A. O. from the aforesaid ——— day of ——— in the year aforesaid, unto the day of exhibiting this information, at ——— aforesaid in the county aforesaid, with force and arms, unlawfully and unjustly hath continued, and doth yet continue, by reason whereof the common highway aforesaid hath become and is greatly straitned, so that the lieges and subjects of the said lord the king upon and through the same common highway aforesaid, with their horses, carts, and carriages, cannot go, pass, ride, and labour as they ought and were wont to do, to the great and common nuisance of all the lieges and subjects of the said lord the king in and through the said common highway going, passing, riding, and labouring, and against the peace of the said lord the king. Trem 196.

Homicide.

HOMICIDE in law signifies the killing of a man by a man. 1 Haw. 66.

And it includes in it, not only petit treason, concerning which see title **Treason**; but also the several offences which are treated of in the following sections.

There is also another kind of untimely death of a man, not properly homicide: when he is killed by a horse, a cart, a tree, or the like, and not by a man; which is called casual death: for which see title **Deodand**.

I. Justifiable homicide.

II. Homicide by misadventure.

III. Homicide by self defence.

IV. Manslaughter.

V. Murder.

VI. Self-murder.

I. Justifiable homicide.

1. To make homicide justifiable, it must be owing to some unavoidable necessity, to which the person who kills another must be reduced, without any manner of fault in himself. *1 Haw. 69.* On a real necessity.

And there must be no malice coloured under pretence of necessity; for wherever a person who kills another, acts in truth upon malice, and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder. *1 Haw. 69.*

2. By the act, 28 H. 8. c. 3. It shall be lawful to every liege man, all notorious and known thieves, and thieves found robbing and spoiling or breaking houses by night or by day, and thieves found with the manner, to kill them, and to take them without impeachment, arraignment, or grievance to him to be done by the king, his justices, officers, or any of his ministers, for any such manslaughter or taking. Killing robbers and burglars.

3. If trespassers in a forest, chase, park, or warren, or any inclosed ground wherein deer are kept, will not render themselves to the keepers, upon a hue and cry made to stand to the king's peace, but fly from, or defend themselves against them, they may be slain by them. *1 Haw. 71.* Trespassers in parks.

4. If rioters, or forcible enterers or detainers, stand in opposition to the justices lawful warrant, and any of them is slain; it is no felony. *Hale's Pl. 37.* Rioters.

5. If a man come to burn my house, and I shoot out of my house, or issue out of my house, and kill him; it is no felony. *Hale's Pl. 39.* Houseburners.

6. If a woman kill him that assaulteth to ravish her; is no felony. *Hale's Pl. 39.* Ravishers.

7. If a person having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons, or public officers, with or without a warrant from a magistrate; he may be lawfully slain by them. *1 Haw. 70.* Felon refusing to be arrested.

8. So if a felony hath actually been committed, and an officer or minister of justice, having lawful warrant so to do, arrest an innocent person, and such person assault the officer or minister of justice; the officer is not bound by law to give back, but to carry him away; and if in execution of his office, he cannot otherwise avoid it, but in striving kill him, it is no felony. And in that case the officer or minister of justice shall forfeit nothing; but the party so assaulting, or offering to fly away, and is killed, shall forfeit his goods. *3 Inst. 56.* Suspected felons refusing to be arrested.

9. Also

Felon escaping.

9. Also if a person arrested for felony, break away from his conductors to gaol, they may kill him, if they cannot otherwise take him. But in this case likewise, there must have been a felony actually committed. *Hale's Pl. 36, 37.*

Felon breaking gaol.

10. Also if a criminal endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray, *1 Haw. 71.*

Resisting a civil process.

11. In civil causes; altho' the sheriff cannot kill a man who flies from the execution of a civil process; yet if he resists the arrest, the sheriff or his officer need not give back, but may kill the assailant. *Hale's Pl. 37.*

So if in the arrest and striving together, the officer kill him, it is no felony. *Hale's Pl. 37.*

Trial and discharge.

12. In all these cases the party upon arraignment having pleaded not guilty, the special matter must be found; whereupon the party shall be dismissed, without any forfeiture, or pardon purchased. *Hale's Pl. 38.*

II. Homicide by misadventure.

Chancemedley.

1. I have purposely avoided the word *chancemedley* in this place, because authors do not seem to be agreed whether it is to be applied to homicide by *misadventure*, or to *manslaughter*. *Ld. Coke* and *Mr. Hawkins* seem to understand it of *manslaughter*; *Ld. Hale*, and others, of homicide by *misadventure*. The original meaning of the word seems to favour the former opinion, as it signifies a sudden or casual meddling or contention; whereas homicide by *misadventure* supposeth no previous meddling or falling out. But the same author sometimes, in different places, applies it to both of them promiscuously.

What is homicide by misadventure.

2. Homicide by misadventure is, where a man is doing a lawful act, without intent of hurt to another, and death casually ensues. *Hale's Pl. 31.*

Cases of homicide by misadventure.

3. As where a labourer being at work with a hatchet, the head flies off, and kills one who stands by. *1 Haw. 73.*

4. Or where a third person whips a horse, on which a man is riding, whereupon he springs out, and runs over a child, and kills him; in which case the rider is guilty of homicide by misadventure, and he who gave the blow of manslaughter. *1 Haw. 73.*

5. But if a person, riding in the street, whip his horse to put him into speed, and run over a child and kill him, it is homicide, and not by misadventure; and if he ride so, in a press of people, with intent to do hurt, and the horse killeth another, it is murder in the rider. *1 H. H. 476.*

6. If a person drives his cart carelessly, and it runs over a child in the street, if he have seen the child, and yet drives in upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart ran over the child before it was possible for the carter to make a stop, it is by misadventure. *1 H. H. 476.*

7. So where workmen throw stones, rubbish, or other things, from an house, in the ordinary course of their business, by which a person underneath happens to be killed; if they look out and give timely warning to those below, it will be homicide by misadventure; if without such caution, it

it will amount to manslaughter at least, it was a lawful act, but done in an improper manner. It is said by some, that if this be done in the streets of London, or other populous towns, it will be manslaughter notwithstanding the caution abovementioned. But this will admit of some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution is used, it seemeth that the party is excusable. But when the streets are full, that will not suffice; for in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. *Fost.* 262, 263.

8. It is said before, that this homicide is only when it happeneth upon a man's doing a lawful act; for if the act be unlawful, it is murder. As if a person meaning to steal a deer, in another man's park, shooteth at the deer, and by the glance of the arrow killeth a boy, that is hidden in a bush; this is murder, for that the act was unlawful, altho' he had no intent to hurt the boy, nor knew of him. But if the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of the arrow, this had been homicide by misadventure, and no felony. 3 *Inst.* 56.

9. So if any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is by misadventure; for it was not unlawful to shoot at the wild fowl: But if he had shot at a cock or a hen, or any tame fowl of another man's, and the arrow by mischance had killed a man; if his intention was to steal the poultry (which must be collected from circumstances), it will be murder by reason of that felonious intent; but if it was done wantonly, and without that intention, it will be barely manslaughter. *Fost.* 258, 9.

10. The rule before laid down supposeth, that the act from which death ensued, was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose; the case of a person so offending, will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game, under certain penalties, will not in a question of this kind enhance the accident beyond its intrinsic moment. *Fost.* 259.

11. Further, if there be an evil intent, tho' that intent extendeth not to death, it is murder. Thus, if a man, knowing that many people are in the street, throw a stone over a wall, intending only to fright them, or to give them a little hurt, and thereupon one is killed, this is murder; for he had an ill intent, tho' that intent extended not to death, and tho' he knew not the party slain. 3 *Inst.* 57.

12. And it is a general rule, in case of all felonies, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Haw.* 74.

13. But in all the cases above, if it doth only hurt a man, by such an accident, it is nevertheless a trespass; and the person hurt shall recover his damages; for tho' the chance excuse from felony, yet it excuseth not from trespass. 1 *H. H.* 472.

Escape.

14. If a person escape that hath killed another by misadventure, the town shall be amerced. 2 *Inst.* 149.

This kind of
homicide no fe-
lony.
Bail.

15. This homicide is not felony, because it is not accompanied with a felonious intent, which is necessary in every felony. 1 *Haw.* 75.

16. But yet a person guilty thereof is not bailable by justices of the peace, but must be committed to the assizes. 1 *Haw.* 75.

But if he is taken only on a slight suspicion, the justices of the peace may bail him. 2 *Haw.* 105.

Forfeiture.

17. Altho' this homicide is not properly a man's crime, but his misfortune; yet because the king hath lost his subject, and in respect of the great favour the law hath to the life of a man, and to the end that men should use all care, diligence, and circumspection in all they do, that no hurt should come of their actions, a person convicted hereof shall forfeit his goods, and shall not presently be discharged of his imprisonment, but bailed, that he may sue out his pardon, which he shall have out of the chancery of course. 1 *H. H.* 477, 492. 1 *Haw.* 76.

III. Homicide by self defence.

Se defendendo,
what.

1. Homicide in a man's own defence seems to be, where one who hath no other possible means of preserving his life from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. 1 *Haw.* 75.

Cases of se de-
fendendo.

2. And not only he, who upon an assault retreats to a wall, or some such strait, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable necessity; but if he, who being assaulted in such a manner, and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 *Haw.* 75.

3. And notwithstanding a person who retreats from an assault to the wall, give the other wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. 1 *Haw.* 75.

4. But if the mortal wound was first given, then it is manslaughter. *Hale's Pl.* 42.

5. And an officer who kills one that resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact, without ever giving back at all. 1 *Haw.* 75.

6. But if a person upon malice *prepenſe* strike another, and then fly to the wall, and there in his own defence kills the other, this is murder. *Hale's Pl.* 42.

Accessaries.

7. Hereof there can be no accessaries, either before or after the fact; because it is not done with a felonious intent, but upon inevitable necessity. 3 *Inst.* 56.

Escape.

8. If a man escape, that hath killed another in his own defence, the town shall be amerced. 2 *Inst.* 315.

9. A person guilty hereof is notailable by justices of the peace; but Bail they must commit him till the assizes. 1 *Haw.* 76.

But otherwise it is, if he is taken only on slight suspicion. 2 *Haw.* 105. Power of justice of the peace.

10. Lord *Coke* (2 *Inst.* 316) says, that the justices of the peace cannot take an indictment of killing a man *se defendendo*; because their commission is not general, as is that of the justices of gaol delivery, but limited: but lord *Hale* (2 *H. H.* 46.) holds the contrary.

11. A person convicted hereof, shall not be discharged out of prison but Forfeiture. upon bail, and shall forfeit all his goods, altho' the cause was inevitable. And this, because of the great regard which the law hath for the life of man; and also, by reason that the law intends it had a beginning upon an unlawful cause: for quarrels are not presumed to grow without some wrongs in words or deeds, and so malice on both sides. But he shall have his pardon out of the chancery of course. 3 *Inst.* 56. 1 *Haw.* 76.

12. If a man be indicted for *se defendendo*, and is found Flight. not guilty, yet if it be found that he fled for the same, he shall forfeit his goods for such flight, in not standing to the law of the land. 1 *H. H.* 493.

IV. Manslaughter.

1. By manslaughter is to be understood such killing of a man as happens Manslaughter, either on a sudden quarrel, or in the commission of an unlawful act, without what. out any deliberate intention of doing any mischief at all. 1 *Haw.* 76.

2. There is no difference between murder and manslaughter, but that Without malice. murder is upon malice forethought, and manslaughter upon a sudden occasion. As if two meet together, and striving for the wall, the one kill the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the field and fought, and the one had killed the other, this had been but manslaughter, and no murder; because all that followed was but a continuance of the first sudden occasion, and the blood was never cooled, till the blow was given. 3 *Inst.* 55.

3. There can be no accessaries to this offence before the fact, because it Accessaries. must be done without premeditation. 1 *Haw.* 76.

But there may be accessaries after the fact. 3 *Inst.* 55.

4. This offence is notailable by justices of the peace. 3 *Ed. 1 c.* 15. Bail.

5. It is within the benefit of clergy; but the offender shall forfeit as in Clergy. other felonies. 2 *H. H.* 344.

6. But there is one kind of manslaughter, which by the statute of the 7 Stabbing. *W. c.* 11. is excluded the benefit of clergy; viz. He who shall stab or thrust any person that hath not then any weapon drawn, or hath not then stricken first, so as the person so stabbed or thrust shall die thereof in six months, altho' it cannot be proved that the same was done of malice forethought, shall be guilty of felony without benefit of clergy.

V. Murder.

Murder, what. 1. Murder is, when a man of sound memory, and of the age of discretion, unlawfully killeth any person under the king's peace, with malice forethought, either expressed by the party, or implied by law; so as the party wounded or hurt, die of the wound or hurt, within a year and a day. 3 *Inst.* 47.

Cases of murder.

2. By *malice expressed*, is meant, a deliberate intention of doing any bodily harm to another, whereunto by law a person is not authorized. 1 *H. H.* 451.

And the evidences of such a malice must arise from external circumstances discovering that inward intention; as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like; which are various, according to variety of circumstances. 1 *H. H.* 451.

3. *Malice implied* is in several cases; as when one voluntarily kills another, without any provocation; for in this case the law presumes it to be malicious, and that he is a publick enemy of mankind. 1 *H. H.* 455, 456.

4. Poisoning also implies malice, because it is an act of deliberation. 1 *H. H.* 455.

5. Also when an officer is killed in the execution of his office, it is murder, and the law implies malice. 1 *H. H.* 457.

6. Also where a prisoner dieth by duress of the gaoler, the law implies malice, by reason of the cruelty. 3 *Inst.* 52.

7. And in general, any formed design of doing mischief may be called malice, and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice *prepenſe*, and consequently murder. 2 *Haw.* 80. *Strange* 766. *Oneby's case*. For when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the word *malice* is apt to lead one, a *principle of malevolence to particulars*; for the law by the term *malice (malitia)* in this instance meaneth, that the fact hath been attended with such circumstances, as are the ordinary symptoms of a wicked heart, regardless of social duty, and fatally bent upon mischief. *Foſt.* 256, 7.

8. And wherever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, or the like. 1 *Haw.* 82.

9. Also wherever a person in cool blood, by way of revenge, beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 *Haw.* 83.

10. And

10. And it seems to be agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not. 1 *Haw.* 82.

11. If a man by harsh and unkind usage put another into such a passion of grief or fear, that the party either die suddenly, or contract some disease whereof he dies, though this may be murder or manslaughter in the sight of God, yet in a human judicature it cannot come under the judgment of felony, because no external act of violence was offered, whereof the law can take notice. 1 *H. H.* 429.

12. If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go into the field, and therein fight, and the one killeth the other, this is no malice pre-pensed; for the fetching of the weapon, and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if there were deliberation, as that they meet the next day, nay though it were the same day, if there were such a competent distance of time, that in common presumption, they had time of deliberation, then it is murder. 3 *Inst.* 51. 1 *H. H.* 453.

13. And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not. And it is holden, that the seconds of the party slain are likewise guilty as accessaries. 1 *Haw.* 82.

14. If a physician or surgeon gives a person a potion, without any intent of doing him any bodily harm, but with intent to cure or prevent a disease, and contrary to the physician or surgeon's expectation it kills him, this is no homicide. And lord *Hale* says, he holds their opinion to be erroneous, who think that if he be no licensed surgeon or physician, that occasioneth this mischance, that then it is felony. These opinions (he says) may caution ignorant people not to be too busy in this kind with tampering with physick, but are no safe rule for a judge or jury to go by. 1 *H. H.* 429.

15. But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given her to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother it is murder. 1 *H. H.* 430.

16. Also if a woman be quick with child, and by a potion or otherwise, killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder: but if the child be born alive, and dieth of the potion, battery or other cause, this is murder. 3 *Inst.* 50.

Lord *Hale* says, that in this case it cannot legally be known, whether the child were killed or not; and that if the child die, after it is born and baptized, of the stroke given to the mother, yet it is not homicide. 1 *H. H.* 433. And Mr. *Dalton* says, whether it die within her body, or shortly after her delivery, it maketh no difference. *Dalt.* 332. But Mr. *Hawkins* says, that (in this latter case) it seems clearly to be murder, notwithstanding some opinions to the contrary. 1 *Haw.* 80.

17. Also it seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill it in pursuance of such advice, he is an accessory to the murder. 1 *Haw.* 80.

18. By the 6 *Ann. cap.* 24. If a woman be delivered of a bastard child, and she endeavour privately, either by drowning or seeret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; she shall suffer death as in case of murder, except she can prove by one witness that it was born dead.

19. Lord *Hale* says, if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, and he hath notice thereof, and it doth any body hurt, he is chargeable with an action for it:

If he have no particular notice that it did any such thing before, yet if it is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape, or a monkey, if it get loose and do harm to any person, the owner is liable to an action for the damage:

If he have notice of the quality of any such his beast, and use all due diligence to keep him up, yet he breaks loose and kills a man, this is no felony in the owner, but the beast, is deodand:

But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kills a man, he thinks it is manslaughter in the owner:

But if he did purposely let him loose or wander abroad, with design to do mischief, nay though it were with design only to fright people and make sport, and it kills a man, it is murder in the owner. 1 *H. H.* 431.

Persons present
when murder is
committed.

20. They that are present when any man is slain, and do not their best endeavour to apprehend the murderer or manslayer, shall be fined and imprisoned. 3 *Inst.* 53.

Escape.

21. If a murder be committed in the day time, in a town not inclosed, and the murderer escape, the township shall be amerced: but if inclosed, whether the murder be in the night or day, the town shall be amerced, 3 *Inst.* 53.

Where the
stroke is in
one county,
and the death
in another.

22. Where any person shall be feloniously stricken or poisoned in one county, and die in another county; the offender may be indicted in the county where the party dies, before the coroner, justices of the peace, or other justices. 10 *Car.* 1. *sess.* 2. c. 19. s. 1.

Where the
principal com-
mitteth the of-
fence in one
county.

23. Where a murder is committed in one county, and a person is accessory in another county, he may be indicted in the county where he was accessory, on certificate of the conviction of the principal in the county where he committed the murder. s. 3.

By

Homicide.

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By the 10 *Hen. 7. cap. 21.* If any person of malice premeditated do slay or murder, or procure any other persons to slay or murder any of the King's subjects within this land of *Ireland*, such persons shall be deemed traitor attainted of high treason, likewise as it should extend to our sovereign Lord's person, and the chief lords shall have their escheats and forfeitures of all lands, &c. Murder made high-treason.

By the act 9 *Ann. cap. 4.* Nothing in the act 10 *Hen. 7. cap. 21.* shall be taken to bar or take away the right of any persons from bringing appeals of murder, but that such appeals of murder may be brought, and such process, proceedings, and judgment may be thereupon had, as might have been before making of the said act. Appeals not taken away.

And by the 7 *Will. 3. cap. 11.* Every person who shall stab or thrust any person that hath not then any weapon drawn, or that hath not then first stricken the party which shall so stab or thrust, so as the persons so stabbed or thrust shall thereof die within the space of six months, although it cannot be proved that the same was done of malice forethought, yet the party so offending and being thereof convicted, shall be excluded from the benefit of their clergy. *f. 1.* Stabbing made felony without clergy.

This act shall not extend to any persons which shall kill any person *se defendendo*, or by misfortune, or in any other manner than as aforesaid, nor shall extend to any persons who in keeping the peace shall chance to commit manslaughter, so as the said manslaughter be not committed wittingly and of purpose, under pretext and colour of keeping the peace, nor shall extend to any persons which in chastising or correcting his child or servant, shall besides their purpose chance to commit manslaughter. *f. 2.* Self defence, &c. allowed.

VI. Self-murder.

1. A *felo de se*, or felon of himself, is a person, who being of sound mind, and of the age of discretion, voluntarily killeth himself. 3 *Inst. 54.* 1 *H. H. 411.* Felo de se.

2. If a man give himself a wound, intending to be *felo de se*, and dieth not within the year and day after the wound, he is not *felo de se*. 3 *Inst. 54.* Year and day.

3. Mr. *Hawkins* speaks with some warmth against an unaccountable notion (as he calls it) which hath prevailed of late, that every one who kills himself must be *non compos* of course; because it is said to be impossible, that a man in his senses should do a thing so contrary to nature, and all sense and reason. But he argues, that if this doctrine were allowable, it might be applied in excuse of many other crimes as well as this; as for instance that of a mother murdering her child, which is also against nature and reason: and this consideration, instead of being the highest aggravation of a crime, would make it no crime at all, for it is certain a person *non compos mentis* can be guilty of no crime. 1 *Haw. 67.* Non compos.

And lord *Hale* says, it is not every melancholy or hypochondriacal distemper, that denominates a man *non compos*, for there are few who commit this offence, but are under such infirmities; but it must be such an alienation of mind, as renders a person to be a madman, or frantick, or destitute of the use of reason, which will denominate him *non compos*. 1. *H. H. 412.*

4. The

Homicide.

Forfeiture.

4. The offender herein doth incur a forfeiture of goods and chattles, but not of lands; for no man can forfeit his land, without an attainder by course of law. *3 Inst. 54.*

Nor shall his goods be forfeited, until it be lawfully found by the oath of 12 men; and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the justices in sessions may inquire thereof; for they have power by their commission to enquire of all felonies: and a presentment thereof found before them, intitles the king to the forfeiture. *3 Inst. 54, 55. Dalt. c. 144.*

But nevertheless, the forfeiture shall relate to the time of the wound given, and not to the time of the death, or of the inquisition. *3 Inst. 55. Dalt. c. 144. 1 Hale's Pl. 29. 1 Haw. 68.*

But lord *Hale*, in his history of the pleas of the crown, seemeth to doubt, whether it shall relate to the time of the death only, and not to the time of the wound given. *1 H. H. 414.*

Corruption of blood.

5. Nor doth the offence work any corruption of blood, or loss of dower. *1 Haw. 68.*

Burial.

6. By the rubrick in the common prayer, before the burial office (confirmed by act of parliament, *13 & 14 C. 2. c. 4.*) persons who have laid violent hands upon themselves, shall not have that office used at their interment.

Horses.

Stealing of horses belongs to title **Larceny**.

I. Buying of stolen horses.

II. Killing or maiming horses in the night.

I. Buying of stolen horses.

Places for selling horses.

1. **BY** the *4 Ann. cap. 11.* it is enacted, that the proprietor or chief keeper of every fair and market *overt*, shall appoint a particular open place where horses, &c. shall be used to be sold. *§. 1.*

Entering sales.

2. In which place there shall be by the proprietor or keeper of the fair or market, appointed one sufficient person to take toll, and keep the same place from ten of the clock before noon until sun-set every day of the fair and market, to enter the sale, gift, or exchange, of every horse, &c. sold, exchanged, or past away, upon pain to forfeit for every default twenty shillings.

3. And on the bargain, exchange, or gift, of every horse, &c. in any fair or market, all the parties making the bargain, exchange, or gift, of every horse, &c. shall be present, and also the horse, &c. sold, exchanged, given, or put away, shall be produced before such person so appointed.

Book keepers entries.

4. And when they are all present and not before, such book-keeper, toll-keeper, or other person, shall write in a book the names, surnames, and dwelling-places, of all the said parties, and the colour with one special mark

mark at least of every such horse, &c. on pain to forfeit for every default twenty shillings.

5. And the person appointed to be keeper of the said book, shall within one day next after every such fair or market, deliver his said book to the proprietor, farmer, or chief keeper, of the said fair or market, who shall then cause a note to be made of the number of all horses sold, exchanged, &c. at the said market or fair, and shall subscribe his name, or set his mark thereunto, on pain on every default therein to forfeit twenty shillings.

f. 2.

6. The sale, gift, or exchange, in any fair or market *overt*, of any horse, &c. that shall be stolen, shall not alter the property, unless the said horse, &c. shall be in the time of the fair or market wherein the same shall be so sold, given, or exchanged, openly ridden, walked, or kept, by the space of one hour together at the least, betwixt ten of the clock in the morning and the sun-setting, in the open place of the fair or market wherein horses are used to be sold, and not within any house or private place. f. 3.

Property not altered.

7. And unless all the parties making the bargain, gift, or exchange, shall also come together and bring the horse, &c. so sold, exchanged, or given, to the open place appointed for the book-keeper, and there enter their christian-names, fir-names, and dwelling-places, in manner aforesaid, with the colour and one special mark at the least of the horses, &c. in the keeper's book.

8. No person shall in any fair or market, sell, give, or exchange, any horse, &c. unless the book-keeper or chief officer of the market or fair, will take upon him perfect knowledge of the person that shall offer to sell, give, or exchange, any horse, and of his true christian-name, fir-name, and place of residence, and shall enter all the same his knowledge in a book kept for sale of horses. f. 4.

9. Or else that he so offering to sell, give, or exchange, any horse, shall bring to the book-keeper one credible person that will testify before such book-keeper, that he knoweth the party that so selleth, &c. such horse, &c. and his true name, fir-name, mystery, and dwelling-place, and there enter in such book as well the true christian-name, fir-name, mystery, and place of abode of him who so selleth, &c. such horse, &c. as of him who so shall avouch his knowledge of the same person, and shall also enter the price that he shall have for the same. Vouchers.

10. And no book-keeper shall enter any sale, gift, or exchange, of any horse, unless he knoweth the party who so selleth, &c. such horse, &c. and his true christian-name, fir-name, mystery, or place of his residence, or the party who shall so avouch.

11. And such book-keeper shall give to the person so buying or taking by gift or exchange, such horse, &c. requiring and paying three pence for the same, a note in writing of the contents of the same, subscribed with his hand. No. e of the entry.

12. Upon pain that the person making any untrue avouchment, and every person so selling, giving, or exchanging any horse, without being known to the book-keeper or other officer aforesaid, or without bringing such a voucher causing the same to be entered, and every book-keeper, toll-keeper, or other officer of fair or market neglecting to do his duty, shall severally forfeit for every such default twenty shillings.

E e e

13. And

Horses.

13. And also every sale, gift, or exchange of any horse in fair or market, not used in all points according to the meaning of this act, shall be void.

14. The said several penalties to be recovered before the justices of assize where they sit, and where they do not sit, then before the justices of the peace at their several quarter-sessions, and levied by their respective warrants by distress on the goods of every person making default and sale of such goods, returning the overplus, &c.

Offences.

15. The judges of assize in their respective circuits, and the justices of the peace of every place where the judges of assize do not sit, shall in their respective assizes and sessions within the limits of their commission, inquire and determine all offences against this statute. *s. 5.*

Penalties.

16. All the penalties in this act, shall be the one half to the poor of the parish where the offence is committed, or other public work as the judges of assize and justices of the peace in their sessions shall respectively order, and the other moiety to the person who will sue for the same. *s. 6.*

II. Killing or maiming horses.

Offence made felony.

1. By the 9 *Ann. c. 11.* If any person shall maliciously and willingly maim, kill, or destroy any horses, &c. every such offence shall be adjudged felony, provided nothing herein contained shall extend to the gelding stone-horses going at large. *s. 2.*

Without clergy.

2. And by the 2 *G. 1. c. 22.* Where any person shall be convicted of malicious and wilful maiming, killing, or destroying any horses, &c. according to *Stat. 9 Ann. cap. 11. to prevent the maiming of cattle*, such persons duly convicted, shall suffer death as in cases of felony without benefit of clergy. *s. 1.*

Reward to discoverers.

3. It shall be lawful for the grand-juries of the respective counties by presentment to raise as other county charges are raised, any sums not exceeding ten pounds for any one person, to be paid as a reward to any person who shall discover any offender guilty of malicious maiming, killing, or destroying any horses, &c. or cattle contrary to the before recited act, which sums of money when so raised, shall be paid to such discover and prosecutor, in such proportion as the grand jury shall in their respective presentments prescribe, after the conviction of such offenders, and not otherwise. *s. 2.*

Horse-races.

Running for less than 20 l.

1. **B**y the 13 *Geo. 2. cap. 8.* Any persons who run or shall cause to be run any horse, mare, or gelding, for any wager, sums of money, or any prize, plate, or other goods of less value than twenty pounds, shall for every such offence forfeit such horse, and also the further sum of twenty pounds. *s. 12.*

2. And every person who shall wilfully be present at such race or horse-course, shall forfeit five shillings.

3. All which forfeitures and penalties shall be recovered before any justice of the peace or chief magistrate within their respective jurisdictions, who upon

upon confession of the parties or due proof upon the oath of one credible witness, may hear and determine the same, and by warrant under their hand and seal directed to a constable, seize such horses so forfeited, and levy such sums adjudged against any such persons, by distress and sale of their goods, rendering the overplus if any to the owners.

4. And if in six days after issuing such warrant, such horse, &c. cannot be found and seized by such constable, such justice or chief magistrate shall upon examination of one witness, ascertain the value of such horse, &c. and by his warrant levy such value by distress and sale of the offenders goods, in manner as aforesaid. Forfeiture to be valued.

5. And in case such penalties so forfeited and adjudged are not paid, or the offender hath not sufficient goods on which the same can be levied, they shall be put in the stocks for three hours.

6. And all high and petty constables are hereby required to seize all such horses, &c. so soon as may be after such races, and carry them before the next justice or chief magistrate, that the offenders may be proceeded against in manner aforesaid. Horses to be seized.

7. Provided, that where such penalty or forfeiture exceeds ten pounds, and any person thinks *himself* aggrieved by any adjudication, he may appeal to the next going judge of assize, who in a summary way may finally determine the same. Appeal.

8. All sums of money so levied, and the money arising by the sale of such horse, &c. which the person seizing the same is hereby authorized to sell, shall be distributed, one third part thereof to the poor of the parishes where such races were, one other third part thereof to the *incorporated society* for promoting *English protestant schools*, and the other third part to the informer. *s. 13.*

9. Provided, that it shall be lawful for the corporation of horse-breeders in the county of *Down*, incorporated under his Majesty's charter, to continue their races according to the powers given them by the said charter, without being subject to any of the penalties mentioned in this act. Corporation of horse-breeders.

10. No persons shall be prosecuted for any of the offences committed against this act, unless they be prosecuted for the same within three months after the offence committed.

11. If any suit shall be prosecuted for any thing done in pursuance of this act, such suit shall be commenced within three calendar months next after the fact was committed, and shall be laid or brought in the county or place where the cause of action shall arise, and the defendants may plead the general issue, &c. General issue.

12. And if the plaintiffs shall become non-suited or discontinue their suits, or if upon demurrer judgment shall be given against the plaintiffs, the defendants shall recover treble costs. Treble costs.

Implements for
work.

1. **B**Y the act 10 & 11 Car. 1. cap. 4. There shall be provided within every county, one or more convenient houses of correction, with convenient backside thereunto adjoining, together with mills, working-cards, and other necessary implements, to set rogues and other idle persons on work. *f. 1.*

Quarter-sessi-
ons.

2. The same houses to be built or provided in some convenient place in every county, which shall be purchased, conveyed, or assured unto such persons, as by the justices of peace or the most part of them in their quarter-sessions shall be thought fit, upon trust, to the intent the same shall be employed for the keeping, correcting, and setting to work of rogues, vagabonds, sturdy beggars, and other idle and disorderly persons.

3. The justices of peace in every county, shall have power at any their quarter-sessions, to make orders for the raising of money upon the inhabitants of the county, for erecting or providing, and for the government and ordering of the said houses, or for stocks of money for the setting to work such persons as shall be committed to the same, or for the yearly payment of such officers as shall be appointed for governors of the said houses, and for such other as they shall think necessary to be employed therein. *f. 3.*

Treasurers to
continue one
year.

4. And the said justices at their quarter-sessions shall yearly appoint one sufficient man inhabiting in the county, to be the treasurer for the receiving and paying out of such monies as shall be collected for the said houses, or for the use of them.

5. And the said treasurer so elected, to continue for one year in his office, and then to give up his charge, with a due account of his receipts and disbursements at the quarter-sessions, to be holden next after the feast of *St. Michael* every year, in the presence of two justices of peace, to such other as shall be from year to year successively erected treasurer.

6. And if any man chosen as aforesaid, shall refuse to accept or execute the said office of treasurership, it shall be lawful for the justices in their quarter-sessions, or in their defaults for the justices of assize, to fine the said treasurer by their discretion, the same fine not to be under three pounds *sterling*, which shall be levied by sale of his goods, by warrant to be given by the said justices to such persons as they shall think fit, which fine so levied, to be towards the maintenance of the said house of correction.

Governors.

7. The justices of peace of every county at their quarter-sessions from time to time, shall elect one or more fit persons to be governor or master of the said houses so to be purchased or provided, which shall have authority to set such rogues, vagabonds, idle and disorderly persons as shall be brought or sent unto the said house to work, being able, for such time as they shall continue in the said house of correction, and to punish the said rogues, vagabonds, idle and disorderly persons, by putting fetters or gives upon them, and by moderate whipping of them. *f. 4.*

8. And the said rogues, vagabonds, and idle persons, during such time as they shall remain in the said house of correction, shall in no sort be chargeable to the country, for any allowance either at their bringing in or going forth, or during the time of their abode there, but shall have such allowance as they shall deserve by their own labour.

9. The

9. The masters or governors of the said houses of correction, shall have ^{Salary of masters.} such sum yearly as shall be thought meet by the most part of the justices of peace at their quarter-sessions, to be payed quarterly before-hand, by the treasurer, during the time that the said masters or governors shall be employed in the said service; the said master or governor giving sufficient security for the performance of the said service, which if the said treasurer shall neglect to perform, the said master or governor shall by warrant from any two justices of the peace of the county, levy such sums as ought to be paid, by distress and sale of so much of the treasurers goods, as the money which shall be behind doth amount unto. *f. 5.*

10. And in defect of such distress, it shall be lawful for any two justices of the peace to commit the said treasurer to the county gaol, until payment be made of such sums as are behind, to the said master or governor.

11. Provided, that before any such warrant be granted for distraining of the said treasurers goods or committing of his body, it shall appear before the said justices either by confession of the party, or by testimony of two sufficient witnesses in the presence of the treasurer, that he hath so much money in his hands appertaining to the said uses, as may satisfy the said master or governor.

12. If such masters of the houses of correction, shall not every quarter-sessions yield a true account unto the justices of peace of all such persons ^{Masters to account.} as have been committed to their custody; or if the persons committed to their custody, or any of them, shall be troublesome unto the country by going abroad, or otherwise shall escape from the said house of correction, before they shall be from thence lawfully delivered, the said justices shall set such fines upon the said masters, as the most part of them in their quarter-sessions shall think fit, and all fines not herein before limited, shall be paid unto the treasurer and accounted for. *f. 6.*

13. But by the act 29 *Geo. 2. cap. 14.* Money for the building, use, or repair of houses of correction, shall, for the future, be raised by presentments of grand-juries, and confirmed by the judges at the assizes, who may appoint overseers to lay out the money so presented, which shall be accounted for, when laid out, in the same manner as money presented for the repair of highways. *f. 6.*

14. No more money shall be presented for the use or repair of any house of correction, after the same is or shall be built, at any one assizes, than ten pounds, *sterl.* *f. 7.*

15. Every house of correction, which shall be hereafter erected, shall be built distinct and separate from the county gaol, with an apartment therein for the reception of women, distinct from that where men shall be confined. *f. 8.*

16. And by the 2 *Geo. 1. cap. 17.* The master and keeper of every house of correction or workhouse, at every general quarter-sessions of the peace to be held for the county, city, or town, wherein such house of correction or workhouse is, shall deliver to the justices at the said quarter-sessions, an exact calendar, or an account of the names of every person in his custody, in writing, and signed by him, together with the time when, and for what, and by whom committed to him, to the end the justices may in open court inquire into the cause of such commitment, and the condition and circumstances ^{Calendar of prisoners.}

House of Correction.

stances of each person, and either continue or discharge them, as shall seem to the court most reasonable. *f. 22.*

17. And every master or keeper of such house of correction or workhouse, failing herein, shall for every such neglect forfeit five pounds to such persons as shall be in his custody, and not returned by him in calendar as aforesaid, to be recovered before the next going justices of assize in a summary way, or at the next quarter-sessions in the county of *Dublin*, by civil bill.

No licences to
retail spirits,
&c.

And by the 3 G. 3. c. 21. No licence shall be granted for the retailing of spiritous liquors, beer, ale, wine, cyder, or other liquors within any gaol, prison, house of correction, work-house, or house of entertainment for any parish poor, and all licences granted, or to be granted, contrary to this provision, shall be void and of no effect. *f. 15.*

General form of a commitment to the house of correction.

Dublin. { *J. P.* esquire, one of the justices of our lord the king assigned to keep the peace within the said county, to the constable of _____ in the said county, and to the keeper of the house of correction at _____ in the said county.

THESE are to command you the said constable in his said majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said house of correction the body of A. O. being charged before me [or, convicted before me, or otherwise as the case shall be: And here set forth the offence.] And you the said keeper are hereby required to receive the said A. O. into your custody in the said house of correction, and him there safely to keep until _____ [or, for the space of _____ And here set forth the time, and the manner of punishment.] Herein fail you not. Given under my hand and seal the _____ day of _____ in the _____ year of _____.

Hue and Cry.

Meaning of the I.
words.

LORD Coke saith, that hue and cry (called in ancient records *butesum & clamor* (do mean the same thing; for that *buer* in *French* is to hoot or shout, in *English* to cry. 2 *Inst.* 173. 3 *Inst.* 116.

But since it appeareth by the old books (of which also lord Coke maketh observation, 2 *Inst.* 173.) that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonymous, but that this *butesum* or *booting* is by the *horn*, and *crying* by the *voice*; with which also accordeth to the *French* word *hubet*, which signifieth a huntsman's horn: So that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry, is said to be practised also in *Scotland*.

And this blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time: for amongst the laws of *Wibred* king of *Kent*, in the year 696,

696, this is one; that "if a stranger go out of the road, and neither shout nor blow a horn, he shall be taken for a thief."

2. Hue and cry is the old common law process after felons, and such as have dangerously wounded any person. And this hath received great countenance and authority by several acts of parliament. 2 H. H. 98. Hue and cry, what.

3. To prevent felonies; In walled towns the gates shall be shut from sun setting to sun rising: and none shall lodge within the town, from nine of the clock till day, unless his host will answer for him. In other towns, watches shall be kept: and if a watchman arrest a night walker, and he disobey and fly, the watchman may make hue and cry. 13 Ed. 1. ft. 2. c. 4. Watches to be kept.

4. When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night; the party grieved, or any other, may resort to the constable of the vill; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he know it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night; for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found. 2 H. H. 100, 101. 3 Inst. 116. Application to the constable.

5. For levying hue and cry, altho' it is a good course to have the warrant (A) of a justice of the peace, when time will permit, in order to prevent causeless hue and cry; yet by the frame of the statutes it is by no means necessary, nor is it always convenient; for the felon may escape before the warrant be obtained: and hue and cry was part of the law, before justices of the peace were first instituted. 2 H. H. 99. Justice's warrant.

6. And the duty of the constable is, to raise the power of the town, as well in the night as in the day, for the prosecution of the offender. 3 Inst. 116. Constable to raise the town.

7. And upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felons. 2 H. H. 103. And to search.

8. But tho' he may search suspected places or houses, yet his entry must be by the doors being open; for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore in case of such search, the breaking open the door is at his peril, namely, justifiable, if he be there; not justifiable, if he be not there: But it must be always remembred, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken. 2 H. H. 103. 2 Haw. 86. Breaking doors to search.

Notice to the
next constable.

9. If the person, against whom the hue and cry is raised, be not found in the constablewick, then the constable shall give notice to the next constable, and he to the next, until the offender be found, or till they come to the sea side. And this was the law before the conquest. 3 *Inst.* 116.

And to the next.

10. And the officer of the town where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other town round about him, and not to one next town only. And in such cases it is needful to give notice in writing (to the pursuers) of the things stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, and the like, and which way he is gone, if it may be. *Dalt. c.* 54.

What shall be
done where the
person cannot
be described.

11. But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good, as hath been said, and must be pursued, tho' no person certain be named or described. 2 *H. H.* 103.

And therefore in this case, all that can be done is, for those that pursue the hue and cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. *id.*

All persons shall
follow the hue
and cry.

12. By the statute of the 3 *Ed. 1. c.* 9. All shall be ready and apparelled at the commandment and summons of sheriffs, (or constables, 2 *Inst.* 171.) and at the cry of the country, to sue and arrest felons; on pain of a grievous fine. And if default be found in the lord of the franchise, the king shall take the franchise to himself; and if in the sheriff or other officer, they shall have one year's imprisonment, and shall make a grievous fine.

And by the statute of the 13 *Ed. 1. st.* 2. *c.* 1. It is likewise enacted, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county.

And no hue and cry shall be lawful, except it be by horsemen and footmen. 10 & 11 *C. 1. c.* 13. *f.* 7.

And the life of hue and cry is fresh suit. 3 *Inst.* 117.

Breaking doors
to arrest upon
pursuit.

13. If the person pursued by hue and cry be in a house, and the doors are shut, and refused to be opened on demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case, where he may arrest, though it be only a suspicion of felony; for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case: and the same law is, upon a dangerous wound given, and a hue and cry levied upon the offender. 2 *H. H.* 102.

Killing in the
pursuit.

14. And it seems in this case, that if he cannot be otherwise taken, he may be killed; and the necessity excuseth the constable. 2 *H. H.* 102.

Arresting an
innocent per-
son.

15. If hue and cry be raised against a person certain for felony, though possibly he is innocent; yet the constables, and those that follow the hue and cry, may arrest and imprison him in the common gaol, or carry him to a justice of the peace, to be examined where he was at the time of the felony committed, and the like. 2 *H. H.* 102.

Arresting a
person by de-
scription.

16. If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, and the like; yet the hue and cry doth justify the constable, or other person following it, in apprehending the per-
son

Hue and Cry.

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son so described, whether innocent or guilty: for that is his warrant; it is a kind of process that the law allows of, not usual in other cases, namely, to arrest a person by description. 2 *H. H.* 103.

17. In case of hue and cry once raised and levied, on supposal of a felony committed, though in truth there was no felony committed, yet those that pursue hue and cry, may arrest and proceed, as if so be a felony had been really committed. Case of arresting upon hue and cry levied without cause.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person (especially a constable) upon hue and cry levied, do extremely differ; for in the former case, there must be a felony averred to be done, and it is issueable; but in the latter, to wit, upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is sufficient, though perchance the information were false.

And the reasons hereof are these; 1. Because the constable cannot examine the truth or falshood of the suggestion of him that first levied it, for he cannot administer to him an oath; and should he forbear his pursuit of the hue and cry till it be examined by a justice of the peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because the constable is by the several acts of parliament compellable to pursue hue and cry; and he is punishable, and so are those of the vill, if they do it not. 3. Because he that first raiseth a hue and cry, where no felony is committed, that is, he who giveth the false information, is severely punishable by fine and imprisonment, if the information be false.

And therefore if he raise hue and cry upon a person that is innocent; yet they that pursue the hue and cry may justify the imprisonment of that innocent person; and the raiser is punishable: and by the same reason, if he give notice of a felony committed, where there was in truth none.

And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion; and therefore, 1. In respect that it is upon hue and cry, there needs no averment, that the felony was done, if the arrest be by that constable that first received the information, and so raised the hue and cry; or if the arrest were made by that constable, or those vills, to whom the hue and cry came at the second hand, it must be averred, that such a hue and cry came to them, purporting such a felony to be done. 2. But also inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person is left to the suspicion and discretion of the constable, or of the people of the second or third vill, he that arrests any person upon such general hue and cry, must aver that he suspected, and shew a reasonable cause of suspicion.

18. It seems that they who are taken upon fresh hue and cry, are not bailable, as being to be accounted amongst those persons, who are under a violent presumption of guilt. 2 *Haw.* 98. Persons taken on hue and cry.

19. By the 13 *Ed.* 1. *st.* 2. *c.* 6. Constables of hundreds shall be chosen, who shall present before justices assigned, defaults of the suits of towns, and all such as lodge strangers in uplandish towns, for whom they will not answer. High constables to present.

20. And they which levy not hue and cry, or pursue not upon hue and cry, may be indicted, fined, and imprisoned. 3 *Inst.* 117. Punishment of those who follow not hue and cry.

Power of the
leet to inquire.

21. And it is an article of the leet, to inquire of hues and cries levied and not pursued. 18 Ed. 2.

A Warrant to levy hue and cry on a robbery having been committed.

{ To all constables and other officers, as well in the said county of _____, as elsewhere, to whom the execution hereof doth or shall belong.

WHEREAS A. I. of _____ in the county of _____ yeoman, hath this day made information upon oath before me J. P. esquire, one of his Majesty's justices of the peace in and for the said county of W. that on this present _____ day of _____ in the _____ year of the reign of _____ betwixt the hours of three and four in the afternoon of the same day, at a place called _____ in the said county of W. in the king's highway there, two malefactors and felons to him the said A. I. unknown, in and upon him the said A. I. then and there being in the peace of God and of our lord the king, feloniously did make an assault, and him the said A. I. then and there feloniously did put in great fear and danger of his life, and the sum of _____ of lawful money of Great Britain, of the goods and chattels of him the said A. I. from the person, and against the will of him the said A. I. then and there violently and feloniously did steal, take, and carry away; and that one of the said malefactors and felons, to him the said A. I. unknown, is a tall, strong man, and seemeth to be about the age of _____ years, is pitted in his face with the small pox, and hath the scar of a wound under his left eye, and had then on a dark brown riding coat, &c. and did ride upon a bay gelding with a star on his forehead; and the other, &c. And that after the said felony and robbery committed, they the said malefactors and felons to him the said A. I. unknown, did fly, and withdrew themselves to places unknown, and are not yet apprehended: These are therefore to command you forthwith to raise the power of the towns within your several precincts, and to make diligent search therein, for the persons above described, and to make fresh pursuit and hue and cry after them from town to town, and from county to county, as well by horsemen as by footmen; and to give due notice hereof in writing, describing in such notice the persons and the offence aforesaid, unto every next constable on every side, until they shall come to the sea shore, or until the said malefactors and felons shall be apprehended; and all persons whom you or any of you shall, as well upon such search and pursuit, as otherwise apprehend or cause to be apprehended, as justly suspected for having committed the said robbery and felony, that you do carry forthwith before some one of his said Majesty's justices of the peace in and for the county where he or they shall be so apprehended, to be by such justice examined, and dealt withal according to law. And hereof fail you not respectively, upon the peril that shall ensue thereon. Given under my hand and seal, at _____ in the said county of W. the _____ day of _____ aforesaid, in the year aforesaid.

- I. *Indictment, what.*
- II. *What offences are indictable.*
- III. *Within what time an indictment shall be brought.*
- IV. *How far several offenders or several offences may be joined in one indictment.*
- V. *Whether the grand jury may examine witnesses against the king.*
- VI. *How many witnesses are requisite to an indictment.*
- VII. *Whether a grand jury may find an indictment specially.*
- VIII. *Indictment to be in English.*
- IX. *Form of an indictment.*
- X. *Charges of an indictment.*

I. *Indictment, what.*

INDICTMENT cometh of the *French* word *enditer*, and signifieth in law, an accusation found by an inquest of twelve or more upon their oath. And as the *appeal* is ever the suit of the party, so the indictment is always the suit of the king, and, as it were, his declaration; and the party who prosecutes it, is a good witness to prove it. And when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a *presentment*; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *inquisition*. 1 Inst. 126. 2 Haw. 209.

II. *What offences are indictable.*

There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a publick nature, as misprisions, contempts, disturbances of the peace, oppressions, and all other misdemeanors whatsoever of a publick evil example against the *common law*, may be indicted; but no injuries of a private nature, unless they some way concern the king. 2 Haw. 210.

Also it seems to be a good general ground, that wherever a *statute* prohibits a matter of a publick grievance to the liberties and security of a subject; or commands a matter of publick convenience, as the repairing of the common streets of a town; an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet if the party offending hath been fined to the king, in the action brought by the party (as it is said that he may in

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every action for doing a thing prohibited by statute); it seems questionable, whether he may afterwards be indicted, because that would make him liable to a second fine for the same offence. 2 Haw. 210.

But if a statute extend only to *private* persons, or if it extend to all persons in general, but chiefly concern disputes of a *private* nature, as those relating to distresses made by lords on their tenants; it is said that offences against such statute will hardly bear an indictment. 2 Haw. 211.

Also where a statute makes a new offence, and appoints a particular method of proceeding, without mentioning an indictment, it seemeth to be settled at this day, that it will not maintain an indictment. 2 Haw. 211. Str. 679.

But lord Hale distinguishes upon this, and says, that if a statute prohibit any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not an indictment; the party may be indicted upon the *prohibitory clause*, and thereupon fined, but not to recover the penalty; but then it seems the fine ought not exceed the penalty; but if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit so much, to be recovered by action of debt, bill, plaint, or information; then he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. 2 H. H. 171.

Also, where a statute adds a farther penalty, to an offence prohibited by the common law; there can be no doubt, but that the offender may be still indicted, if the prosecutor thinks fit, at the common law. And if the indictment for such offence conclude *against the form of the statute*, and cannot be made good as an indictment upon the statute, it seems to be now settled, that it may be maintained as an indictment at common law. 2 Haw. 211.

A fact amounting to a felony, is not indictable as a trespass. L. Raym. 712.

III. Within what time an indictment shall be brought.

By the 2 G. c. 20. All indictments upon any statute penal, whereby the forfeiture is limited to the king, shall be sued within two years after the offence committed: if the forfeiture is limited to the king and prosecutor, the suit shall be in one year; and in default thereof, the same shall be sued for the king, within two years after that year ended. But where a statute limits a shorter time, the suit shall be brought within such time limited.

But for indictments of felonies, and other misdemeanors where there is no forfeiture to the king, or to the king and prosecutor, no time is limited by any statute; but the several acts of general pardon have the effect of a like limitation.

IV. How far several offenders or several offences may be joined in one indictment.

1. If there be one offender, and several offences committed by him, as burglary and larceny, they may be contained in one indictment. 2 H. H. 173. But

But in the case of *K. and Glendon, T. 4 G. 2.* There was an indictment setting forth, that the defendant made an assault upon *Sarah Beatniff* and *Elizabeth Cooper*, and did them beat, wound, and evil intreat. After verdict for the king, it was moved in arrest of judgment, that these were two distinct offences, and therefore could not be laid in the same indictment; and of that opinion was the court, and the judgment was arrested. *Str. 870.*

2. If there be *several offenders* that commit the *same offence*, though in law they are several offences in relation to the several offenders, yet they may be joined in one indictment; as if several commit a robbery, or burglary, or murder. *2 H. H. 173.*

3. And so it is, though the offences are of *several degrees*, but dependant one upon another, as the principal in the first degree, and the principal in the second degree, to wit, present, aiding, and abetting the principal, and accessory before or after. *2 H. H. 173.*

4. Also several persons may be indicted in the same indictment for *several offences of the same nature*, as for keeping disorderly houses; but the indictment ought to set forth that they severally did so. *2 H. H. 173.*

And this is only to be understood where the offences may be joint, as in extortion, maintenance, receiving stolen goods, and the like; and not where the offence is a separate act in each, as in the case of *K. against Philips* and others, *M. 5 G. 2.* Six were indicted in one indictment for *perjury*, and four of them pleading, were convicted. It was moved in arrest of judgment, that the crime of perjury is in its nature several, and two cannot be indicted together. And by the court, There may be great inconveniencies if this is allowed; one may be desirous to have a certiorari, and the other not; the jury on the trial of all, may apply evidence to all, that is but evidence against one: And they cited a case, *T. 6 An. Q. against Hodgson* and others, where two were indicted for being scolds, and compared to barratry, and it was held not to lie. And in the principal case judgment was arrested. *Str. 921.*

In like manner, *E. 11 G. K. against Weston* and others. There was an indictment against six jointly and severally for exercising a trade; and quashed, because there ought to be distinct indictments. *Str. 623.*

5. Larcenies committed of several things, though at *several times*, and from *several persons*, may be joined in one indictment. *2 H. H. 173.*

V. Whether the grand jury may examine witnesses against the king.

Lord *Hale* says, that the grand jury at the assizes or sessions ought only to hear the evidence for the king, and in case there be probable evidence, they ought to find the bill, because it is but an accusation, and the party is to be put on his trial afterwards. *2 H. H. 157.*

Which doctrine is also laid down by chief justice *Pemberton* in the case of the earl of *Shaftsbury*, *St. Tr. V. 3. p. 415.*

But the learned Editor of *Hale's History* observes upon this, that Sir *John Hawles* in his remarks on the said case, *St. Tr. V. 4. p. 183.* unanswerably shews, that a grand jury ought to have the same persuasion of the truth of the

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the indictment as a petty jury, or a coroner's inquest; for they are sworn to present the truth, and nothing but the truth.

And lord *Coke* says, that seeing indictments are the foundation of all, and are commonly found in the absence of the party accused, it is necessary there should be substantial proof. 3 *Inst.* 25.

VI. How many witnesses are requisite to an indictment.

An indictment may be found upon the oath of one witness only, unless it be for high treason, which requires two witnesses. 2 *Haw.* 256. And unless, in any instance, it be otherwise specially directed by act of parliament.

VII. Whether the grand jury may find an indictment specially.

It seems to be generally agreed, that the grand jury may not find part of an indictment to be true, and part false; but must either find a true bill or *ignoramus* for the whole; and that if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew. 2 *Haw.* 210.

VIII. Indictment to be in English.

All indictments, informations, inquisitions, and presentments, shall be in *English*, and be written in a common legible hand, and not court hand; on pain of 50*l.* to him that shall sue in three months. 11 *Geo.* 2. cap. 6.

IX. Form of an indictment.

In order to understand this matter rightly, it is judged requisite first to insert the intire form of an indictment, and then to take it in pieces, and explain the several parts of it in their order.

The instance which is chosen is on the statute of stabbing. 1 *J. c.* 8.

The *caption* of the indictment is no part of the indictment itself, but is the style or preamble, or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove; or when the whole record is made up in form; for whereas the record of the indictment, as it stands upon the file in the court where it is taken, is only thus, *The jurors for our lord the king upon their oath present*; when this comes to be returned upon a *certiorari*, it is more full and explicit, as follows: 2 *H. H.* 166.

Dublin. **A**T the general quarter-sessions of the peace holden at Kilmainham in and for the county aforesaid, the seventh day of April in the first year of the reign of our sovereign lord George the third of Great Britain, France, and Ireland, king, defender of the faith, and so forth, Before J. P. and K. P. esquires, and others their associates, justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county, and also

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to bear and determine divers felonies, trespasses, and other misdemeanors in the said county committed by the oath of——good and lawful men of the county aforesaid, sworn and charged to inquire for our said lord the king, and for the body of the county aforesaid, it is presented;

That John Armstrong late of ——in the county aforesaid, yeoman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the thirtieth day of March in the first year of the reign of our said sovereign lord George the third of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at the hour of nine in the afternoon of the same day, with force and arms, at——aforesaid in the county aforesaid, in and upon one George Harrison in the peace of God and of our said lord the king then and there being (the aforesaid George Harrison not having any weapon then drawn, nor the aforesaid George Harrison having first stricken the said John Armstrong) feloniously did make an assault; and that the aforesaid John Armstrong, with a certain drawn sword, of the value of five shillings, which he the said John Armstrong in his right hand then and there had and held, the said George Harrison in and upon the right side of the belly near the short ribs of him the said George Harrison (the aforesaid George Harrison as is aforesaid then and there not having any weapon drawn, nor the aforesaid George Harrison then and there having first stricken the said John Armstrong) then and there feloniously did stab and thrust, giving unto the said George Harrison then and there with the sword aforesaid, in form aforesaid, in and upon the right side of the belly near the short ribs of him the said George Harrison, one mortal wound of the breadth of one inch, and of the depth of nine inches; of which said mortal wound, he the said George Harrison then and there instantly died: And so the jurors aforesaid upon their oath aforesaid do say, that the said John Armstrong him the said George Harrison on the aforesaid thirtieth day of March in the year aforesaid, at——aforesaid in the county aforesaid, in manner and form aforesaid, feloniously did kill; against the peace of our said lord the now king, his crown and dignity, and against the form of the statute in such case made and provided.

Dublin] The name of the county must be in the margin, or repeated in the body of the caption. 2 H. H. 166.

At the general quarter-sessions of the peace] The court where the indictment is made, must be expressed; otherwise the caption is erroneous. 1 H. H. 166. 2 Haw. 252.

Holden at——in and for the county aforesaid] It must appear where the sessions was held; and that the place, where it was held, is within the extent of the commission. 2 H. H. 166.

The seventh day of April in the first year of the reign of our sovereign lord George the third] It hath been adjudged, that if the caption of the indictment describe the sessions holden in the time past, and not in the time present; or as holden on such a day in such a year of the king, without ascertaining what king, it is insufficient. But it seems to be agreed, that it is sufficient to express the year of the king, without adding that of our lord. 2 Haw. 255.

The

The seventh day] Figures to express numbers are not allowable in an indictment; but numbers must be expressed in words. 2 H. H. 170. Cr. Cir. 109. Andr. 137. H. 11 G. 2. K. and Haddock. Or at least in Roman numerals. Str. 261. H. 6 G. K. and Philips.

Before J. P. and K. P. esquires, and others their associates] It is not necessary to name all the justices, but only so many as are enabled to hold a session, and the rest may be supplied by the words *and others their associates*. 2 H. H. 166.

And altho' no sessions can be held without one of the justices being of the *quorum*, yet in the caption there need not be any mention which of them, or whether of them, are of the *quorum*, for it is sufficient if *de facto* the sessions be held before him or them that are of the *quorum*, altho' not so mentioned, and so is the usual course. 2 H. H. 167.

And also to hear and determine, &c.] These words are necessary, because without this clause (by the commission) they cannot proceed by indictment. 2 H. H. 166. Str. 442.

By the oath] If the caption concludes that *it is presented* without saying *on their oath*, it shall be quashed; for their presentment must be upon oath, and so returned. 2 H. H. 168.

By the oath of———] It must name the jurors that presented the offence; and therefore by the oath of *A. B. C. D.* and others, is not good; for it may be the presentment was by a less number than 12, or that some one of them was incapacitated who might influence all the rest, as for instance a person outlawed; in which case the indictment may be quashed by plea. 2 H. H. 167.

Good and lawful men of the county aforesaid] These words also, lord Hale saith, are necessary. 2 H. H. 167. But Mr. Hawkins says, they have been often over-ruled; because all men shall be intended to be honest and lawful, till the contrary appear. 2 Haw. 215.

Sworn and charged to inquire for our said lord the king, and for the body of the county aforesaid] These words also seem requisite to be inserted. 2 H. H. 167. But yet do not seem to be absolutely necessary. L. Raym. 710.

It is presented; that John Armstrong, late of———in the county aforesaid, yeoman] The name of the party indicted regularly ought to be inserted, and inserted truly in every indictment. 2 H. H. 175.

But the inhabitants of a parish may be indicted for not repairing the highway, although no person is particularly named. Wood. b. 4. c. 5.

It is said that no person indicted can take any advantage of a mistaken surname in the indictment, notwithstanding such surname hath no manner of affinity with its true one, and he was never known by it. 2 Haw. 230, 1, 2, 3. 2 H. H. 176.

But

But the mistake of the christian name is pleadable, and the party shall be dismissed from that indictment. 2 H. H. 176.

But the safest way is to allow his plea of *misnomer*, both as to his surname and as to his christian name, for he that pleads *misnomer* of either, must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. 2 H. H. 176.

Also an indictment naming the defendant by two christian names is not good. L. Raym. 562.

If the *county* is in the margin, and the indictment sets forth the fact to be done at such a place *in the county aforesaid*, it is good, for it refers to the county in the margin; but if there be two counties named, one in the margin, and another in the addition of any party, or in the recital of an act of parliament, the fact laid at such a place in the county aforesaid, vitiates the indictment, because two counties are named before, and therefore it is uncertain to which it refers. Crown Cir. 115, 116.

By the 1 H. 5. c. 5. In all indictments on which process of outlawry lieth, to the names of the defendants *additions* shall be made of their estate, or degree, or mystery, and of the towns, or hamlets, or places, and counties where they were or be conversant.

But altho' the defendant be indicted by a wrong name or addition, or with no addition, yet if he appear, and plead not guilty, without taking advantage of that defect, he shall never alledge the *misnomer* or want of addition to stop his trial or judgment; for by such his appearance, and pleading to issue, the indictment is affirmed, and the *misnomer* or want of addition saved. 2 H. H. 176.

And if several persons be indicted for one offence, *misnomer* or want of addition of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in law as several indictments. 2 H. H. 177.

And it is the common practice, where an indictment is insufficient, while the grand jury is before the court, to amend it by their consent, in a matter of form, as the name or addition of the party, or the like. 2 Haw. 245.

Not having God before his eyes, but being moved and seduced by the instigation of the devil] I do not find it asserted by any authority, that these words are necessary in an indictment.

On the thirtieth day of March in the first year of the reign, &c.] No indictment can be good, without precisely shewing a certain *day* of the material facts alledged in it. 2 Haw. 235.

And if the offence be done in the night, before midnight, the indictment shall suppose it to be done in the day before; and if it happen after midnight, then it must say, it was done that day after. Lamb. 492.

And altho' the day be inserted, yet if the *year* is not likewise inserted, the indictment is insufficient. 2 H. H. 177.

But where an indictment charges a man with a bare omission, as the not scouring such a ditch, it is said, that it needs not shew at any time. 2 Haw. 236.

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It is most regular to set forth the year, by shewing the year of the king; yet this may be dispensed with for special reasons, if the very year be otherwise sufficiently expressed. 2 Haw. 236.

And if it say, on such a day last past, without shewing in what year, that is good enough; for the certainty may be found out by the style of the sessions. Lamb. 491.

But tho' the day or year be mistaken in the indictment, yet if the offence were committed in the same county, tho' at another time, the offender ought to be found guilty; but then it may be requisite, if any escheat or forfeiture of land be conceived in the case, for the petit jury to find the true time of the offence committed; and therefore it is best in the indictments to set down the times as truly as can be, tho' it be not of absolute necessity to the defendant's conviction. 2 H. H. 179.

And this the rather, because the jury are to find the indictment upon their oaths. Dalt. c. 184.

Upon which ground, namely, because the jury are sworn to present the truth, it is best to lay all the facts in the indictment as near to the truth as may be; and not to say, in an indictment for a small assault (for instance), wherein the person assaulted received little or no bodily hurt, that such a one *with swords, staves, and pistols, beat, bruised, and wounded him, so that his life was greatly dispaired of*; nor to say in an indictment for an highway being obstructed, that the king's subjects cannot go thereon, *without manifest danger of their lives*; and the like. Which kind of words, as they are not at all necessary, so they may stagger an honest man upon his oath, to find the fact as so laid.

At the hour of nine in the afternoon of the same day] It is not necessary to mention the *hour*, in an indictment. 2 Haw. 235.

With force and arms] By the 37 H. 8. c. 8. (in England) It is enacted, that whereas it had been commonly used in indictments, to put in the same the words *vi & armis*, and in divers of the same indictments to declare the manner of the force and arms, viz. *baculis, cultellis, arcubus, & sagittis*, or such like, where in truth the parties had no manner of such weapons at the time of the offence committed; therefore for the future, these words, or such like, shall not of necessity be put in any inquisition or indictment.

But yet were such words are proper and pertinent, it is safe and advisable to insert them, if it be to no other purpose than to aggravate the offence. 2 Haw. 242.

At— ~~*aforesaid in the county aforesaid*~~] No indictment can be good, without expressly shewing some *place* wherein the offence was committed, which must appear to have been within the jurisdiction of the court. 2 Haw. 236.

But a mistake of the place will not be material upon the evidence, on not guilty pleaded, if the fact be proved at some other place in the same county. 2 Haw. 237.

And it is not sufficient that the county be expressed in the margin, but the vill where the offence was committed must be alledged to be in the county

county named in the margent, or, *in the county aforesaid*, which seems to be sufficient where but one county is named before, but to be uncertain where a county is named in the body of the indictment different from that in the margent. 2 *Haw.* 220. 2 *H. H.* 180.

In and upon one George Harrison] Wherever the person injured is known to the jurors, his name ought to be put in the indictment. 2 *Haw.* 232.

But if they know not his name, an indictment for the murder of a person unknown, or for stealing the goods of a person unknown, is good. 2 *H. H.* 181.

Also there is no need of an addition of the person upon whom the offence is committed, unless there be a plurality of persons of the same name; neither then is it essential to the indictment, though sometimes it may be convenient for distinction sake to add it. 2 *H. H.* 182.

In the peace of God, and of our said lord the king, then and there being] It is usual to alledge this, but not necessary, and possibly not true, for he might be breaking the peace at the time. 2 *H. H.* 186.

The aforesaid George Harrison not having any weapon then drawn, nor the aforesaid George Harrison having first stricken the said John Armstrong] An indictment grounded upon an offence made by act of parliament, must by express words bring the offence within the substantial description made in the act of parliament; and those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion *against the form of the statute*. 2 *H. H.* 170.

And so it is, if an act of parliament oust clergy in certain cases, as murder *of malice forethought*, robbery *in or near the highway*, though the offences themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, though convicted, unless these circumstances, as *of malice forethought*, or *near the highway*, be expressed in the indictment. 2 *H. H.* 170.

But there is no necessity in an indictment on a public statute, to recite such statute; for the judges are bound *ex officio* to take notice of all public statutes. 2 *Haw.* 245.

Yet if the prosecutor take upon him to recite it, and materially vary from a substantial part of the purview of the statute, and conclude *against the form of the statute aforesaid*, he vitiates the indictment. 2 *Haw.* 246.

Also it seems to be generally agreed, that a misrecital of the place or day at which the parliament was holden, vitiates an indictment. 2 *Haw.* 246.

And it hath been adjudged, that a misrecital of the title of a statute is fatal. 2 *Haw.* 247.

But there is no need to alledge in an indictment, that the defendant is not within the benefit of the provisos of the statute; although the same may be necessary in a *conviction*: for since no plea can be admitted to a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty. 2 *Haw.* 250. 2 *H. H.* 170, 1.

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Feloniously did make an assault] There are several words of art which the law hath appropriated for the description of the offence, which no circumlocution will supply: as *feloniously*, in the indictment of any felony; *burglariously*, in an indictment of burglary; and the like. 2 H. H. 184.

And if a man be indicted that he *stole*, and it is not said *feloniously*, this indictment imports but a trespass. 2 H. H. 172.

With a certain drawn sword] Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poisoning, or strangling, it doth not maintain the indictment upon evidence. 2 H. H. 185.

Of the value of five shillings] Regularly it ought to set forth the price of the sword or weapon, or else say of no value; for the weapon is a deodand forfeited to the king, and the township shall be charged for the value, if delivered to them; but this seems not to be essential to the indictment. 2 H. H. 185.

Which be the said John Armstrong in his right hand then and there had and held] It must shew in what hand he held his sword. 2 H. H. 185.

In and upon the right side of the belly near the short ribs of him the said George Harrison] There must be a *certainty* of the offence committed, and nothing material shall be taken by intendment or implication; but the special manner of the whole fact ought to be set forth with certainty. 2 Haw. 225, 227.

And therefore in the case of murder, it ought to shew in what part of the body the person was wounded: and therefore if it be on his arm, or hand, or side, without saying whether right or left, it is not good. 2 H. H. 185.

If theft be alledged in any thing, the indictment must set forth the value of the thing stolen; that it may appear, whether it be grand or petty larceny. 2 H. H. 183.

In like manner, an indictment that the defendant took and carried away such a person's goods and chattels, without shewing what in certain, as one horse, one cow, is not good. 2 H. H. 182.

An indictment that the defendant is a common highwayman, a common defamer, a common disturber of the peace, and the like, is not good; because it is too general, and contains not the particular matter wherein the offence was committed. 2 H. H. 182.

In like manner an indictment for divers scandalous, threatening, and contemptuous words, spoken of a justice of the peace, is not good, but ought to set forth the words in special. Str. 699.

An indictment for disobeying an order of justices, must find positively, that such an order was made, and not by way of recital, *that whereas* — L. Raym. 1363.

But in an indictment on a conviction, it is not necessary to set forth the conviction at large, but only shortly, that such a one was before such and such

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such justices convicted, according to the form of the statute, and thereupon a warrant was issued, &c. L. Raym. 1196.

Then and there feloniously did stab and thrust] In an indictment it is best, and often necessary, to repeat the time and place, to the several parts of the fact. 2 H. H. 178.

Thus in an indictment of murder or manslaughter, as well the day and place of the stroke, or other act done, as of the death, must be expressed; the former, because the escheat or forfeiture of lands relates thereto; the latter, because it must appear, that the death was within the year and day after the stroke. 2 H. H. 179.

One mortal wound of the breadth of one inch, and of the depth of nine inches] Regularly the length and depth of the wound is to be shewed; but this is not necessary in all cases, as namely, where a limb is cut off; so it may be also a dry blow. 2 H. H. 186.

But though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done as near the truth as may be; yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is sufficient to maintain the indictment. 2 H. H. 186.

Against the peace of our said lord the king] An indictment without concluding against the peace, is insufficient, though it be but for using a trade not having been an apprentice; for every offence against a statute is against the peace, and ought so to be laid. 2 H. H. 188.

Also an indictment that concludes against the peace, and saith not of *our lord the king*, is insufficient. 2 H. H. 188.

His crown and dignity] An indictment need not conclude *against his crown and dignity*, though it be usual in many indictments. 2 H. H. 188.

And against the form of the statute in such case made and provided] Regularly, if a statute only make an offence, or alter an offence from one crime to another, as making a bare misdemeanor to become a felony, the indictment for such new made offence, or new made felony, must conclude against the form of the statute, or otherwise it is insufficient. 2 H. H. 192.

But if a man be indicted for an offence, which was at common law, and concludes against the form of the statute, but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offence at common law. 2 H. H. 171.

And if an offence were felony at common law, but a special act of parliament quists the offender of some benefit that the common law allowed him, when certain circumstances are in the fact; though the body of such indictment must express those circumstances, according as they are prescribed in the statute, yet the indictment need not conclude against the form of the statute: Thus on the statute of the 8 *El. c. 4.* in case of pick-pockets, the body of the indictment must bring them within the express purview of the statute, or otherwise they shall have the benefit of clergy; but it need not conclude against

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against the form of the statute, neither is it usual in such cases, for it was felony before, and the statute doth not give a new punishment, nor make it to be a crime of another nature, but only takes away clergy. But yet, if it should conclude in such case against the form of the statute, it would not viti-
tiate the indictment, but would be only surplusage. 2 H. H. 190.

If an act of parliament, making an offence, be but temporary, and made perpetual by another statute, the indictment concluding against the form of the statute, is good. 2 H. H. 173.

If the former statute be discontinued, and revived by another statute, the best way is to conclude against the form of the statutes; though there is good opinion, that it is good enough to conclude against the form of the first statute. 2 H. H. 173.

If one statute be relative to another, as where the former makes the offence, the latter adds a penalty; the indictment ought to conclude against the form of the statutes. 2 H. H. 173.

X. Charges of an indictment.

By the 4 Ann. cap. 10. No fees shall be demanded or received from any persons against whom any indictment shall be preferred and returned *Ignoramus* by the grand jury, for drawing or ingrossing of such indictment, or for the juries verdict of *Ignoramus* thereon. §. 1.

And if any sheriff, sub-sheriff, clerk of the crown or peace, judges clerk or other person, shall demand or take from any person against whom any indictment shall be preferred on which an *Ignoramus* shall be found, or from any other on his or her behalf, any money or other reward for the drawing or ingrossing such indictment, or for such verdict of *Ignoramus*, every person so offending, shall for every offence forfeit twenty pounds, the one moiety thereof to be to the Queen, and the other moiety to them that will sue for the same in any court of record within their respective limits, &c.

Provided, that nothing herein contained shall extend to any indictments for treason, misprision of treason, felony, or premunire. §. 2.

And by the 3 Geo. 2. cap. 9. No fee shall be taken by any sheriff, sub-sheriff, clerk of the crown, clerk of the peace, their deputies, or other person, for any bill or judgment returned *Ignoramus* by the grand jury, from any person as to whom the same shall be so returned, or for any recognizance, discharge, or on any pretence relating to such bill, judgment, or recognizance, or discharge. §. 2.

And if any person shall offend herein, they shall forfeit to the party aggrieved 20*l.* to be recovered by action of debt in any of the four-courts, or by civil bill as small debts are recovered, with costs of suit.

For the drawing of indictments for other misdemeanors, not being treason or felony, no fee is limited by any statute: and therefore the same dependeth upon the custom and ancient usage.

Condition of a recognizance to prefer a bill of indictment.

THE condition of this recognizance is such, That if the abovebound A. I. shall personally appear at the next general quarter sessions of the peace to be holden at _____ in and for the said county, and then and there prefer a bill of indictment against A. O. late of _____ yeoman, for the felonious taking and carrying away of _____ the property of _____ and shall then and there give evidence concerning the same, to the jurors who shall inquire thereof on the part of our said lord the king: And in case the same be found a true bill, Then if the said A. I. shall personally appear before the jurors who shall pass upon the trial of the said A. O. and give evidence upon the said indictment, and not depart without leave of the court, Then this recognizance to be void.

Condition of a recognizance to answer to an indictment.

THE condition of this recognizance is such, That if the abovebound A. O. shall personally appear at the next general quarter sessions of the peace to be holden at _____ in and for the said county, then and there to answer to an indictment to be preferred against him by A. I. of _____ yeoman, for assaulting and beating him the said A. I. and not depart without leave of the court, Then this recognizance to be void.

Infants.

1. **B**Y an infant, or minor, is meant any one who is under the age of 21 years. 1 Inst. 2.

2. It is said, generally, that those who are under a natural disability of distinguishing between good and evil, as infants under the age of 14 years, which is called the age of discretion, are not punishable by any criminal prosecution whatsoever. But this must be understood with some allowance; for if it appear by the circumstances, that an infant under the age of discretion, could distinguish between good and evil, as if one of the age of nine or ten years, kill another and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit as much as if he were of full age: but in such case the judges will in prudence respite the execution, in order to get a pardon; and it is said, that if an infant apparently wanting discretion, be indicted and found guilty of felony, the justices themselves may dismiss him, without a pardon. And in general it must be left to the discretion of the judge, upon the circumstances of the case, how far an infant, under that age, is *capax doli*, or hath knowledge to discern betwixt good and evil. *Hale's Pl. 43. 1 Haw. 2. 1 H. H. 18.*

A remarkable instance of this kind, we have in the case of *William York*. At Bury summer assizes 1748, *William York*, a boy of ten years of age, was convicted before lord chief justice *Willes*, for the murder of a girl of about five

Indictment.

five years of age ; and received sentence of death. But the chief justice, out of regard to the tender years of the prisoner, respited execution, till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case ; which he reported to the judges as follows.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work, the girl was missing ; and the boy being asked what was become of her, answered, that he had helped her up, and put on her cloaths, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man under whose care the children were, observed that a heap of dung near the house had been newly turned up. And upon removing the upper part of the heap, he found the body of the child, about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner.

Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said, that the child had been used to foul herself in bed ; that she did so that morning (which was not true, for the bed was searched and found to be clean) ; that thereupon he took her out of the bed, and carried her to the dung heap ; and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung heap ; placing the dung and straw that was bloody under the body, and covering it up with what was clean ; and having so done, he got water and washed himself as clean as he could.

The boy was the next morning carried before a neighbouring justice, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice very prudently deferred proceeding to a commitment, till the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself ; and then ordered him into a room, where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession : Upon which he was committed to gaol.

On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice ; and of many declarations to the same purpose, which the boy made to other people after he came to gaol, and even down to the day of his trial. For he constantly told the same story in substance, commonly adding that
the

the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confession, he was convicted.

Upon this report of the chief justice, the judges having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to have been guilty of this fact, there are so many circumstances stated in the report, which are undoubtedly tokens of what lord chief justice *Hale* somewhere calleth a *mischievous discretion*, that he is certainly a proper object for capital punishment, and ought to suffer. For it would be of very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity.

There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, and the like, which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and therefore, tho' the taking away the life of a boy of ten years old may favour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences, and as the sparing this boy merely on account of his age will probably have a quite contrary tendency, — in justice to the publick, the law ought to take its course, unless there remaineth any doubt touching his guilt.

In this general principle all the judges concurred. But two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting, that it might possibly appear on further inquiry, that the boy had taken this matter upon himself, at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly, the chief justice did grant one or two more reprieves; and desired the justice who took the boy's examination, and also some other persons in whose prudence he could confide, to make the strictest inquiry they could into the affair, and make report to him.

At length, he receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last. But before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state. And at the summer assizes 1757, he had the benefit of his majesty's pardon, upon condition of his entering immediately into the sea service. *Fost. 70.*

3. But within seven years of age, there can be no guilt whatsoever of any capital offence: the infant may be chastized by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if he be indicted for such an offence as is in its nature capital, he must be acquitted. Under seven.

1 *H. H.* 19, 20.

4. An infant under 14, is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it; and though in other felonies Committing a rape. *malitia supplet aetatem* in some cases, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion. 1 *H. H.* 630.

5. An infant may be guilty of forcible entry, in respect of personal actual violence. 1 *Haw.* 147. Forcible entry. And the justices may fine him therefore: But yet

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it shall be good discretion in the justices of the peace, to forbear the imprisonment of such infant. *Dalt. c. 126.*

Because it is said, that he shall not be subject to corporal punishment, by force of the general words of any statute, wherein he is not expressly named. *1 Haw. 147.*

Shall be liable
to damages for
trespass.

6. But if one, who wants discretion, commit a trespass, against the person or possession of another, he shall nevertheless be compelled in a civil action to give satisfaction for the damage. *1 Haw. 2. 1 H. H. 15, 16.*

May bring an
appeal.

7. An infant may bring an appeal, although it take from the defendant the benefit of waging battle; but he must prosecute such appeal by a guardian. *2 Haw. 161, 162.*

An appeal likewise may be brought against him. *2 Haw. 168.*

Cannot be an
approver.

8. An infant under the age of discretion cannot be an approver; because he cannot take the oath requisite in that case. *2 Haw. 205.*

How far he
may be a wit-
ness.

9. In case of rape, committed upon a child of 12 years old, such child may be sworn as evidence; yea if she be under that age, if it appear to the court that she knows and considers the obligation of an oath, she may be sworn. And in case of evidence against witches, an infant of nine years old was sworn. *1 H. H. 634. Dalt. 378.*

Whether he
may be a juror.

10. An infant before 21 years of age, shall not be sworn in an inquest. *7 W. c. 32. s. 4. 1 Inst. 172.*

Woman's age
of dower,
marriage, and
choosing guar-
dian.

11. A woman at 9 years of age may have dower; at 12 may consent to marriage; and at 14 is of age of discretion, and may chuse a guardian. *1 Inst. 78.*

Man's age of
allegiance, mar-
riage, and chu-
sing guardian.
Cannot make a
deed.

12. A man is of age at 12 years to take the oath of allegiance in the torn or leet; and at 14 is of age of discretion, may consent to marriage, and chuse his guardian. *1 Inst. 78.*

13. At 21, and not before, persons may bind themselves by any deed, and alien lands, goods, and chattels. *1 Inst. 171.*

Nor enter into
recognizance.

14. Upon which ground, infants may not enter into recognizance to keep the peace, or to be of the good behaviour, but their sureties only.

May contract
for necessaries.

15. But an infant may bind himself to pay for his necessary meat, drink, apparel, physick, and such like; and also for his good teaching or instruction, whereby he may profit himself afterwards: but if he binds himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. *1 Inst. 172.*

And in *Earl's case*, *1 Salk. 387.* it is said, that an infant may buy necessities, but cannot borrow money to buy; for he may misapply the money, and therefore the law will not trust him, but at the peril of the lender, who must lay it out for him, or see it laid out.

May present to
a benefice.

16. Also other things of necessity shall bind him, as a presentation to a benefice; for otherwise the lapse shall inure against him. *1 Inst. 172.*

May convey in
a court of equi-
ty.

17. And infants seised of estates in trust, or by way of mortgage, may make conveyances thereof, as the courts of chancery or exchequer shall direct. *2 Geo. 1. cap. 6.*

May purchase.

19. Also, an infant hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age, he may either agree thereunto, and perfect it, or without any cause to be alledged, waive, or disagree to the purchase: and so may his heirs after him, if he agree not thereunto after his full age. *1 Inst. 2.*

Infants.

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20. The common law seems not to have determined precisely, at what age one may make a testament of a personal estate: it is generally allowed, that it may be made at the age of 18, and some say under, for the common law will not prohibit the spiritual court in such cases. *1 Inst. 89. 1 H. H. 17.* May make a will.
21. A person is of age to be an executor at 17; and an administration of any one during the minority of an infant, ceaseth when the infant comes to that age. *5 Co. Pigot's case. 1 H. H. 17.* May be an executor.
22. Any person having child or children, under 21 years of Age, and not married, may by deed or will attested by two witnesses, dispose of the custody and tuition of such child or children, until they shall be of age of 21, or for a lesser time; and this, whether such parent be within or above the age of 21. *14 & 15 Car. 2. c. 19. s. 3.* May bequeath the tuition of his children.
23. An infant cannot answer but by guardian; but he may sue either by his next friend or by guardian. *3 Salk. 196.* May sue by procheinamy.
24. If an infant of the age of 17 years release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of the action. *1 Inst. 264.* In what case he may release a debt.
27. Servants above the age of 18, embezzling their master's goods to the value of 40 s. shall be punished as felons. *33 H. 8. ff. 1. c. 5.* Infant servant embezzling goods.

Information.

1. **I**Nformations are of two kinds; 1. Such as are merely at the suit of the king: And, 2. Such as are partly at the suit of the king, and partly at the suit of the party; which are commonly called informations *qui tam*, from those words in the information when the proceedings were in *latin*, *qui tam pro domino rege quam pro seipso*, &c. *2 Haw. 259.* Information at the suit of the king. At the suit of the party.
2. Of near affinity to an information *qui tam*, is an action upon a statute: which is either a *private* action, which is, when an action is given upon a statute to the king, and to the *party* grieved only; or a *popular* action which is, where the action is given to the king, or to any one that will sue for the king and himself. *Wood b. 4. c. 4.* Private action upon a statute. Action popular.
3. But if the king commenceth his suit before the informer, the king shall have the whole forfeiture (because in such case he also is the informer); and he may, before the informer begins his suit, release the penalty to the offender, and bar all others; but if, after a popular action is brought by the informer, the king's attorney will enter *ulterius non vult prosequi*, the informer may prosecute for his part. *Wood b. 4. c. 4.* In what case the king may have the whole penalty.
4. Where a matter concerns the publick government, and no particular person is intitled to an action, there an information will lie. *18 El. c. 5. s. 1. 1 Salk. 374.* In what cases an information will lie.
5. An information lies, at the *common law*, for a great variety of crimes less than capital, as batteries, cheats, perjuries, riots, extortions, nufances, contempts, and such like; and also it lies in very many cases by *statute*, wherein the offender is liable to a fine or other penalty. *Finch 340. 2 Haw. 260.*

Information.

6. And in general, it seems that of common right an information *at the suit of the king*, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded. 2 Haw. 260.

7. But an information or action *qui tam* will not lie on any statute, which prohibits a thing as being an immediate offence against the publick good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it; because otherwise it goes to the king, and nothing can be demanded by the party: but where such statute gives any part of such penalty to him who will sue for it by action or information, any one may bring such action or information, and lay his demand *as well for our lord the king, as for himself*. 2 Haw. 256.

8. Also where a statute prohibits or commands a thing, the doing or omission whereof is an immediate danger to the party, and also highly concerns the peace, safety, or good government of the publick, or the honour of the king, or of his supreme courts of justice, it seems to be the general opinion, that the party grieved may bring his action *qui tam* on such statute. 2 Haw. 265.

In what time it
shall be
brought.

9. By the 2 G. c. 20. *All actions, suits, bills, indictments, or informations on any penal statute, whereby the forfeiture is limited to the king, shall be brought within two years after the offence committed; if limited to the king, and to any other who shall prosecute, then within one year; and in default of such prosecution, then to be brought for the king, in two years after that year ended. Provided, that if they are limited, by statute, to be brought within shorter time, then they shall be brought within such time limited.* f. 5, 6.

On any penal statute] But if an offence prohibited by a penal statute, be also an offence at common law; the prosecution of it, as of an offence at common law, is no way restrained hereby. 2 Haw. 272.

To any other who shall prosecute] That is, to a common informer; and therefore the party grieved is not within the restraint of this statute, but may sue in the same manner as before. 2 Haw. 272.

10. If two informations be exhibited on the same day, for the same offence, they mutually abate one another. 2 Haw. 275.

11. By the 10 & 11 C. c. 12. *All offences against any penal statute, for which any common informer may ground a popular action, bill, plaint, suit, or information, before the judges of assize, or justices of the peace in their general or quarter sessions (having power to hear and determine the same), shall be prosecuted in the county where they were committed, and not elsewhere: and if the offence is not proved to have been committed, in the same county, the defendant shall be found not guilty.* f. 1, 2.

Against any penal statute] H. 8 W. K. and Gaul. Holt Ch. J. said, ten judges had agreed that this statute (21 J. 1. c. 4. from which the above statute was transcribed) doth not extend to any offence created since; so that prosecutions on subsequent penal statutes are not restrained thereby; but this statute is as to them, as it were, repealed *pro tanto*. 1 Salk. 372.

For

For which any common informer may ground a popular action] Therefore this extends not to any suit by a party grieved, or by the attorney general; but only to those brought by common informers. 2 *Haw.* 269, 270.

General or quarter sessions, having power to hear and determine the same] Yet this gives no jurisdiction to justices of peace, which they had not before; but only appoints, that where informations might have been brought in the courts at *Westminster* or before justices of the peace, such informations shall be now brought before justices of the peace only. *Cro. Car.* 112.

In the county where they were committed] *H. 7 G. Smith and Potter.* In the king's bench. In a *qui tam* on the 5 *Eliz.* for exercising a trade, without an apprenticeship, it was moved to stay the proceedings, because the nominal plaintiff had released, and the fact was laid at *Cambridge*, whereas the jurisdiction of the king's bench is at last settled to be restrained by the 21 *J. c.* 4. to actions arising in the county where the king's bench sits, so that if they were to go on to trial, the plaintiff could have no effect of his suit. And of this opinion was the court, and they made a rule that proceedings should be stayed. *Str.* 415.

And not elsewhere] But where a subsequent statute gives a remedy for the recovery of a penalty in any court of record generally, it so far impliedly repeals this restraint, and consequently leaves the informer at his liberty to sue in the courts at *Westminster*. 2 *Haw.* 270.

Also, where a statute limits suits by an informer *qui tam*, to other courts than those of *Westminster hall*; yet any one may, by construction of law, exhibit an information in the exchequer, for the whole penalty, for the use of the king. 2 *Haw.* 268.

12. If jurisdiction be given to the sessions to hear and determine, and it is not said by information; this shall be by indictment, and not information. *Cro. Car.* 112.

And by the aforesaid statute, no officer shall enter any information, bill or plaint, count or declaration, till the informer hath made oath before some of the judges of the court, that the offence was not committed in any other county, and that he believeth in his conscience, that the offence was committed within a year before the information or suit; the oath to be there entered of record. *f.* 3.

16. And the general practice of the court of king's bench is, not to order an information to be filed, without first making a rule upon the defendant to shew cause to the contrary. And this rule is never granted but upon motion in open court, grounded upon affidavit of some offence of an enormous kind, or dangerous tendency. The defendant must be personally served with the rule, and if he do not at the day given for that purpose satisfy the courts by affidavits, that the substance of the charge is false or frivolous, or other reasonable cause against the prosecution, the court usually grants the information. *Barl. Inform.*

17. By

Information.

17. By the said act, *the like process shall be awarded, upon an information by a common informer, as in an action of trespass vi & armis at the common law.* f. 1.

And consequently, the process in all such suits must be by attachment, or *pone per vadios*, and after by distress infinite, where by the return the party appears to be sufficient, otherwise by *capias*. 2 Haw. 284.

Process on a criminal information.

19. But on a criminal information, it is the usual practice of the crown office, first, to award a *subpœna*; and after the return thereof, if no appearance be entered in four days, and an affidavit be made of the service of the *subpœna*, to make out a *capias* of course, where the defendants are informed against in their private capacity, and a *distringas*, where they are sued as a corporation aggregate. 2 Haw. 284.

General issue.

20. *If any information, suit, or action, shall be brought against any person on a penal statute, the defendant may plead the general issue, and give the special matter in evidence.* 10 & 11 C. 1. c. 11. f. 4.

Information not quashed upon motion.

21. The court will not generally quash an information upon motion, but the party must either plead, demur, or move in arrest of judgment. 1 Salk. 372. Str. 185, 953.

Certainty required in an information.

22. But seeing that an information differs from an indictment in little more than this, that the one is found by the oath of 12 men, and the other is not so found, but is only the allegation of the officer or person who exhibits it; whatsoever certainty is required in an indictment, the same at least is necessary also in an information; and consequently as all the material parts of the crime must be precisely found in the one, so must they be precisely alledged in the other, and not by way of argument or recital. 2 Haw. 260, 1.

Not aided by the statutes of jeofails.

23. And therefore the statutes of jeofails (from *J'ayt faille*, I have failed), or the statutes that do remedy oversights in pleading, extend not to informations. Wood b. 4. c. 4.

Information good as to part.

24. If an information contain several offences against a statute, and be well laid as to some of them, but defective as to the rest, the informer may have judgment for so much as is well laid. 2 Haw. 266.

26. It seems to be in a great measure settled, that an *informer* upon a popular statute shall in no case whatsoever have his costs, unless they be expressly given him by such statute; for it is certain, that he cannot recover them by the common law, for that doth not give costs in any case; neither can he recover them by the statute of Gloucester, which gives the demandant his costs in all cases wherein he shall recover his damages; for this seems to suppose some damage to have been done to the demandant in particular, which cannot be said in any popular action. But it seems agreed, that an action on a statute *by the party grieved*, for a certain penalty given by such statute, is within the statute of Gloucester, because such penalty is intended him by way of recompence for his particular damage by the offence prohibited: and if he could recover that only, and no more by way of costs, it would be in most cases in vain for him to sue for it, since the costs of suit would exceed it. But it is said, that no costs shall be recovered in an action on a statute, which gives no *certain* penalty to the party grieved, but only his *damages* in general, if such a statute be introductive of a new law, and give a remedy in a point not remediable at the common law; but there is not that inconvenience in this case, as in the former; because no certain sum being

Information.

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being specified, the jury may give the plaintiff a full satisfaction by way of damages. 2 Haw. 274.

28. And if the defendant plead a recovery by a former action, which former action shall be found to have been collusive; the plaintiff shall recover, as tho' no such action before had been had: and if the defendant shall be convicted of such collusion, he shall be imprisoned two years, by process of capias and outlawry, and that as well at the king's suit, as of every other that will sue. 4 H. 7. c. 20.

And no release of any common person, to any such party, whether before or after any action popular, or indictment of the same commenced or made, hanging the same action, shall be available to surcease the said action, indictment, process, or execution. id.

Form of an information *qui tam*.

Dublin. **B**E it remembred, that A. I. of — in the county of — gent. who as well for our lord the now king, as for himself doth prosecute, cometh before the justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at their general quarter sessions of the peace holden at — in and for the said county, the — day of — in the — year of the reign of — in his proper person; and as well for the same lord the king, as for himself, giveth the court here to understand and be informed, that A. O. late of — in the county aforesaid, yeoman, on the — day of — in the year aforesaid, at — aforesaid, in the county aforesaid, not regarding the laws and statutes of our said lord the king, but intending to — with force and arms [Here insert the offence with the same precision as in an indictment] against the form of the statute in that case made and provided: whereupon the aforesaid A. I. as well for the said lord the king, as for himself, prayeth the advice of this court in the premisses; and that the aforesaid A. O. may forfeit the sum of — according to the form of the statute aforesaid; and that he the same A. I. may have one moiety thereof, according to the form of the statute aforesaid; and also that the aforesaid A. O. may come here into this court, to answer concerning the premisses; and there are pledges of prosecuting, John Doe and Richard Roe. And hereupon it is commanded to the said A. O. that all other things omitted, and all excuses laid aside, he be in his proper person at the next general quarter sessions of the peace to be holden for the said county, to answer as well to our said lord the king, as to the said A. I. who as well for the said lord the king, as for himself, doth prosecute, of and concerning the premisses, and further to do and receive what the said court shall consider in this behalf.

Inrollment.

NO manors, lands, tenements, or hereditaments, shall pass from one to another, whereby any estate of inheritance or freehold shall be made or take any effect in any person, or any use thereof to be made by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's court's of

Inrollment.

of record at *Dublin*, or else within the county where the lands lie, before the *custos rotulorum*, and two justices, and the clerk of the peace, or two of them at the least, whereof the clerk of the peace to be one: The same inrollment to be made in six months after date of the writings; paying, where the land exceeds not 40 s. a year, 2 s. to wit, 12 d. to the justices, and 12 d. to the clerk; and where it exceeds 40 s. a year, then paying 5 s. half to the justices, and half to the clerk: and the clerk of the peace shall inroll and ingross the same in parchment: the same to be kept amongst the records of the county. 10 *Car. 1. sess. 2. c. 1 sect. 18.*

Judgment.

Judgments certain.

1. **O**F judgments, some are fixed and stated; as in cases of treason, felony, præmunire, and misprisions; the particular forms of which may be seen under their respective titles.

Judgments variable.

2. Others are discretionary and variable, according to the different circumstances of each case; thus for crimes of an infamous nature, such as petit larceny, perjury, or forgery at common law, gross cheats, conspiracy not requiring a villainous judgment, keeping a bawdy house, bribing witnesses to stifle their evidence, and other offences of the like nature; it seems to be in a great measure left to the prudence of the court to inflict such corporal punishment, and also such fine, and binding to the good behaviour for a certain time, as shall seem most proper and adequate to the offence. 1 *Haw. 445.*

Judgment in the offender's absence.

3. The court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in court. 2 *Haw. 446.*

Judgment of a joint fine.

4. Where there are several defendants, a joint award of one fine against them all, is erroneous; for it ought to be several against each defendant; for otherwise, one who hath paid his proportionable part, might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another. 2 *Haw. 446.*

Judgment in mitigation of fines.

5. A fine is under the power of the court, during the term in which it is set; and may be mitigated as shall be thought proper: but after the term, it admits of no alteration. 2 *Haw. 446.*

Judgment against the verdict.

6. A judgment contrary to the verdict, is void. *Read. Judgm.*

Judgment by particular statutes.

7. By many statutes, peculiar punishments are appointed for several offences, as pillory, stocks, imprisonment and the like; and in all these cases, no room is left for the justices discretion, for they ought to give judgment, and to inflict the punishment in all the circumstances thereof, as such statutes do direct. *Dalt. c. 188.*

Jurors.

TRIAL by juries is the *Englishman's* birth right, and is that happy way of trial, which notwithstanding all revolutions of times, hath been continued beyond all memory to this present day; the beginning whereof

no history specifies, it being contemporary with the foundation of this state, and one of the pillars of it, both as to age and consequence. *Tr. p. pais 3. Dalt. c. 186.*

Concerning which, I will treat in the order following:

- I. Who may or may not be jurors.
- II. Of making and returning lists of jurors.
- III. Of the sheriff's summoning and returning jurors.
- IV. Of the challenge of jurors.
- V. Of the demeanor of jurors in giving their verdict.
- VI. Of the indemnity and punishment of jurors.

I. Who may or may not be jurors.

1. Mr. *Hawkins* says, it doth not seem to be any where holden, that none but freeholders ought to be returned on a grand jury. 2 *Haw.* 216, 217.

But in another place he says, that by the common law, every grand jurymen ought to be a freeman. 1 *Haw.* 215.

And L. *Hale* says, touching the yearly value of the estate of a grand jurymen, he doth not find any thing determined; but freeholders they ought to be. 2 *H. H.* 155.

2. Also a grand jurymen must be a lawful liege subject; and consequently, neither under an attainder of any treason or felony, nor an alien, nor outlawed, whether for a criminal matter, or as some say, in a personal action; and from hence it seems, that any one who is under a prosecution for any crime, may by the common law, before he is indicted, challenge any of the persons returned on the grand jury, for the defect of any of the qualifications abovesaid. 1 *Haw.* 215.

3. By the 29 G. 2. c. 6. No person (other than strangers, upon trials, *per medietatem linguæ*) shall be qualified to serve as jurors, for the trial of issues Jurors to be freeholders, between party and party, in the courts of *Chancery, King's bench, Common pleas, or Exchequer*, or to serve on any jury, on the trial of any such issue, before justices of assize, or *nisi prius* (except in counties of cities and towns) that shall not be seized of a freehold of the clear yearly value of ten pounds, or being protestants, shall not be possessed of leases for a term of years, of which fifteen years shall be then unexpired, or leases for sixty one years or more, determinable on one or more lives, on which a clear profit rent of not less than fifteen pounds, shall accrue to the lessee. *f. 1.*

4. As to the strangers *per medietatem linguæ* abovementioned, it is enacted by the 28 Ed. 3. c. 13. that in inquests to be taken amongst aliens and denizens

Jurors.

denizens, before any judges, one half of the inquest shall be denizens, and the other half aliens, if so many there be in the place who are not parties; if not, then so many as there are.

And by the 27 *Ed. 3. ft. 2. c. 8.* Before the mayor of the staple, if both parties be strangers, the inquests shall be taken by strangers; if both be denizens, by denizens; if the one party be denizen, and the other alien, half of the jury shall be denizens, and half aliens.

And these aliens need not have any qualification by their estate. 8 *H. 6. c. 29.*

But it seems that the *English* half of the jury ought to have estates of the same value as in other cases. 2 *Haw. 419.*

And in 3 *Salk 81.* it is said, that when the jury are of a town corporate, it is no challenge that they are not freeholders.

And the statutes which require jurors to be of such and such sufficiency, do generally exempt cities, boroughs, and towns corporate.

6. In the torn: Jurors shall have 20s. a year freehold; or 26s. 8d. copyhold. 1 *R. 3. c. 4.*

7. In the leet: It is said by some books, that any person happening to be present at a court leet, or to be riding by the place where it is holden, may for the want of jurors be compelled by the steward to be sworn, whether he be resident within the precincts of the leet, or not: by which it seems to be implied, that any person whatsoever is capable of being put upon the jury in a court leet. 2 *Haw. 69.*

8. The coroner's jury, upon inquests taken before him, are to be of the neighbouring towns: but no qualification by estate is required by any statute. 2 *H. H. 152.*

9. Jurors to inquire of the concealments of other inquests, shall have lands of 40s. a year. 3 *H. 7. c. 1.*

10. Jurors to inquire of forcible entry or detainer, shall have lands or tenements of 40s. a year. 8 *H. 6. c. 9.*

14. Old men above 70, persons continually sick, or being diseased at the time of the summons, or not dwelling in the county, shall not be put in juries of petit assizes; on pain of the sheriff paying damages to the party grieved, and being amerced to the king. 13 *Ed. 1 ft. 1. c. 38.*

And the equity of this statute, and also the reason of the thing, seem plainly so far to extend to grand juries, that if it shall appear, that any of the persons abovementioned be returned on a grand jury, the court will easily excuse their non-appearance. But it seems clear, that any such persons being returned on a grand jury, may lawfully serve upon it if they think fit. 2 *Haw. 216.*

15. The jury ought to be men; yet there shall be a jury of women, to try if a woman be enfeint, upon the writ *de ventre inspiciendo*. *Tr. p. pais 86.*

16. Clergymen cannot be impannelled upon juries. *Lamb. 396.*

17. Dissenting teachers, qualified under the toleration act, are exempted from serving on juries. 6 *G. 1. c. 5. s. 9.*

18. Also quakers. *Ibid. s. 15.*

19. And the jurors ought to come in person and claim their privilege; for the sheriff cannot return it. *Tr. p. pais 87.*

20. And

20. And by the 6 *Ann. c. 6.* No papist shall serve or be returned on any grand jury in the Queen's bench, or before justices of assize, *oyer and terminer*, or gaol delivery or quarter-sessions, unless it shall appear to the justices that a sufficient number of protestants cannot be then had for that service. *f. 5.*

II. Of making and returning lists of jurors.

1. By the 29 *G. 2. c. 6.* No sheriff or under-sheriff, bailiff, or other officer, or person, shall take or receive any reward to excuse any person from serving or being summoned to serve on juries, or under that colour or pretence. No fee for excusing jurors.

f. 2.
2. And no bailiff or other officer appointed by any sheriff or under-sheriff to summon juries, shall summon any person to serve thereon, other than such whose name is specified in a mandate signed by such sheriff or under-sheriff, and directed to such bailiff or other officer, but shall summon every person named in such mandate, by the space of six days at least, before the time appointed for such jury to appear.

3. And if any sheriff, under-sheriff, bailiff, or other officer, shall wilfully transgress in any of the cases aforesaid, any court where such jury is to appear, the judge or justices of assize or *nisi prius*, is required on examination and proof of such offence, in a summary way, to set fines upon persons so offending, as he shall think meet, not exceeding forty pounds, nor less than twenty pounds, according to the nature of the offence, to be estreated into the *Exchequer*. Penalty of 20*l.*

4. Every sheriff or other officer to whom the return of the *venire facias*, or other process for the trial of causes before justices of assize or *nisi prius*, in any county shall belong, shall upon his return of every such writ of *venire facias* (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck by order of court) annex a pannel to every such writ, containing the christian and surnames, additions, and places of abode of such jurors as they shall return. *f. 3.* Pannel to be annexed.

5. Which number shall not be less than thirty-six, or more than sixty, without the direction of the judges appointed to go the circuit, and to sit as judges of assize or *nisi prius* in such county, or one of them, who are empowered, if they see cause, by order under their hands, to direct a greater or lesser number, and then such number as shall be so directed, shall be the number to serve on such jury; and such jury so returned, shall try all the issues at that assize. Number of jurors.

6. And the writs of *habeas corpora*, or *distringas*, subsequent to such writ of *venire facias*, need not have inserted in the bodies of such writs, the names of all the persons contained in such pannel, but it shall be sufficient to insert in the mandatory part of such writs, *the bodies of the several persons named in a pannel to this writ annexed*, or words of the like import, and to annex to such writs, pannels containing the same names as were returned in the pannel, to such *venire facias*, with their additions and their places of abode, that the parties concerned in any such trials may have timely notice of the jurors who are to serve thereon, in order to make their challenges to them, if there be cause. Habeas corpus.

Jurors.

7. And for making the returns and pannels aforesaid, and annexing the same to their writs, no other fees shall be taken, than what are now allowed to be taken for the return of the like writs or pannels annexed to the same; and the persons named in such pannels shall be summoned to serve on juries at the then next assizes or sessions of *nisi prius*, for the respective counties to be named in such writs, and no other.

This act is revived and continued by stat. 1 Geo. 3. cap. 17. sect. 12. unto the first day of May, 1771, and to the end of the then next session of parliament.

III. Of the sheriff's summoning and returning jurors.

Sheriff to sum-
mon jurors to
the sessions.

1. By a clause in the commission of the peace, it is said,—We command our sheriff, that at certain days, which you (the justices) shall make known to him, he cause to come before you, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth shall be the better known and inquired into.

Whether the
sessions may or-
der a jury to be
returned im-
mediately.

2. It seems that justices of the peace may not order a jury to be returned immediately, nor on the same day, for the trial of a prisoner arraigned before them, as justices of gaol delivery may, unless the crime amount to felony, or the party consent to be tried immediately. 2 Haw. 406.

Whether by a-
ward of the
court without
precept.

3. Also it seems that a jury may not regularly be returned before justices of the peace in their sessions, by a bare award of the court, as before justices of gaol delivery; but that there ought to be a particular precept to the sheriff for that purpose. 2 Haw. 405, 406.

How they may
do the same in
cases of felony.

4. But in cases of felony, it is agreed (4 Inst. 164.) and is the usual practice, after the prisoners are arraigned and have pleaded to the country, for the justices to issue a precept to the sheriff, in nature of a *venire facias*, which may bear teste the same day that the prisoners plead, commanding the sheriff to return 24 jurors, to try the issue upon such a day; or they may make it returnable the same day that the prisoner pleads, as at one of the clock in the afternoon, or the like: and this precept must be in the name, and under the seals of the justices or two of them (1 Q.) and not barely by an award upon the roll. 2 H. H. 261, 262.

Form of the
venire facias.

5. The writ of *venire facias* by the statute of the 29 G. 2. c. 6. shall be after this form: *The king, &c. We command, &c. that you cause to come before, &c. twelve free and lawful men of the vicinage of A. every of whom shall have 10l. of land, tenements, or rents, by the year, at least; by whom, &c. and who neither, &c. s. 1. (B)*

Why the jurors
shall be return-
ed of the neigh-
bourhood.

6. The reason why they are required to come from the vicinage is, for that the neighbours are presumed to know what is done in the neighbourhood. 1 Inst. 158.

But yet this is not necessarily required; for they of one side of the county, are by law of the neighbourhood, to try an offence of the other side of the county. 2 H. H. 264.

7. And although the words of the writ be twelve, yet by the ancient course, the sheriff must return 24, for the expedition of justice; for if 12 only

only should be returned, a man would seldom have a full jury appear; and in this case usage and custom makes the law. 2 H. H. 263. Read. Jur.

But the general precept that issues before a session is, to return 24, and commonly the sheriff returns upon that precept 48. 2 H. H. 263.

Upon the grand jury; there may be, and usually are, more than 12: but if there be 12 assenting, tho' others dissent, it is not necessary for the rest to agree. 2 H. H. 161.

But upon a trial by a petit jury; it can be by no more nor less than 12, and all assenting to the verdict. 2 H. H. 161.

8. By the 29 G. 2. c. 6. Where a view shall be allowed in any cause, in such case, six of the jurors who shall be named in such pannel, or more, who shall be mutually consented to by the parties or their attornies on both sides (or if they cannot agree, shall be named by the proper officer of the respective courts of *King's Bench*, *Common Pleas*, or *Exchequer* at *Dublin*, for the causes in their respective courts) shall have the view. f. 7. Case of a view.

9. And such of them as appear, and shall not be challenged off, shall be first sworn upon the jury to try the said cause, before any drawing of the jury, and so many only shall be drawn, to be added to the viewers, who appear and are sworn, as shall, after all defaults and challenges allowed, make up the number of twelve to be sworn for the trial of any such cause.

10. Provided also, that whensoever it shall happen that a jury for the trial of any issue by *nisi prius*, shall not be returned by the sheriffs, but shall be returned by the coroners, or other officers legally appointed, that such coroners, or officers shall return the same number of jurors, and under the same qualifications as the sheriff by law is bound to do, and the jurors, so returned, shall be ballotted for in the same manner. f. 8. Jurors to be ballotted.

11. And whereas it may happen that a sufficient number of the jurors returned may not appear after legal challenges; a *tales* may be granted, and returned as hath been heretofore used. f. 9. Tales granted.

12. All trials on appeals of murder or felony, shall be by jurors returned by the sheriff, or other proper officer, according to the rules of the common law. f. 14.

Tr. 8 W. A rule was made, that when the master is to strike a jury, viz. 48 out of the freeholders book, he shall give notice to the attornies of both sides to be present; and if the one comes, and the other does not, he that appears shall according to the ancient course strike out 12, and the master shall strike out other 12 for him that is absent. 1 Salk. 405.

But if by rule of court, the master is ordered to strike a jury, in case it be not expressed in such rule, that the master shall strike 48, and each of the parties shall strike out 12; the master is to strike 24, and the parties have no liberty to strike out any. 1 Salk. 405. M. 8 W.

13. On a motion for a special jury, in the case of the *King* against *Maccartney*, T. 2 G. for the murder of the Duke of *Hamilton*, it was held by *Parker* chief justice, that there cannot be a special jury in cases of *treason* or *felony*; for the party must have the advantage of challenging 20 in case of *felony*, and 35 in case of high *treason*, without cause shewn. In cases of special juries, there are 48 brought before the master, and he takes 24; so there cannot be a rule for a good jury, nor for a special jury, in this case of a trial at bar; for the jury will be the same with or without such a rule, for they are

Jurors.

are all good juries in *Middlesex*, and so in all cases of jurors at the bar; and if there should be a special jury, it would take away the advantage the party has of challenging peremptorily, altho' not of shewing cause. So no rule was made in this case, lest the sheriff in all other cases, when there is no such rule, should not return a good jury. *Viner. Trial. (D. e. 2.) 5.*

14. And if a jurymen be called, and (being present) refuse to appear; or, having appeared, withdraw himself before he be sworn, the court may set a fine upon him at their discretion. *2 H. H. 309. 35 H. 8. c. 6. f. 9.*

Names of jurors to be put in a box.

15. Last of all; The name of every person, who shall be summoned and impannelled as aforesaid, with his addition, and the place of his abode, shall be written on several distinct pieces of parchment, or paper, being all as near as may be of equal size and bigness, and shall be delivered unto the clerk of such judge of assize or *nisi prius*, who is to try the causes by the sheriff or under-sheriff of the county, or other officer, returning the process, and shall, by the direction and care of such clerk, be rolled up all as near as may be, in the same manner, and put together in a box or glass to be provided for that purpose. *29 G. 2. c. 6. f. 4.*

16. And when any cause shall be brought on to be tried, some indifferent person, by direction of the court, shall, in open court, draw out twelve of the said parchments or papers one after another, and if any of the persons whose names shall be so drawn, shall not appear, or shall be challenged and set aside, then such further number until twelve persons be drawn who shall appear and after all causes of challenge shall be allowed as fair and indifferent.

17. And the said twelve persons so first drawn, appearing and approved of as indifferent, their names being marked in the pannel, and they being sworn, shall be the jury to try the said cause.

Names drawn.

18. And the names of the persons so drawn and sworn, shall be kept by themselves, in some box or glass, to be kept for that purpose, till such jury have given in their verdict, and the same is recorded, or until such jury shall, by consent of the parties, or leave of the court, be discharged, and then the same names shall be rolled up again, and returned to the former box or glass, there to be kept with the other names, remaining at that time undrawn, and so *toties quoties*, as long as any cause remains then to be tried.

19. If any cause shall be brought on to be tried in any of the said courts respectively, before the jury in any other cause shall have brought in their verdict, or be discharged, it shall be lawful for the court to order twelve of the residue of the said parchments or papers, not containing the names of any of the jurors who shall not have so brought in their verdict, or be discharged, to be drawn in such manner as is aforesaid, for the trial of the cause which shall be brought on to be tried. *f. 5.*

IV. Of the challenge of jurors.

And herein,

- i. Of the several kinds of challenge.*
- ii. When the challenge is to be taken.*
- iii. How the challenge shall be tried.*
- iv. How pannels may be reformed by the court, without challenge.*

i. Of the several kinds of challenge.

THERE are two kinds of challenge; either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel*, or little square *pane* of parchment on which the jurors names are written: or to the *polls*, by which are meant the several particular persons or *heads* in the array. *1 Inst. 156, 158.* Two kinds of challenge.

1. Challenge to the *array*, is in respect of the partiality or default of the sheriff, coroner, or other officer that made the return: and this is two-fold; To the array:

(1) Principal challenge to the array: which if it is made good, is a sufficient cause of exception, without leaving any thing to the judgment of the triers. Principal challenge to the array.

Causes of challenge of this sort, are such as these: If the sheriff, or other officer, be of kindred or affinity to the plaintiff or defendant, if the affinity continue. If any one or more of the jury be returned at the nomination of the party plaintiff or defendant, the whole array shall be disquashed. If the plaintiff or defendant have an action of battery against the sheriff, or the sheriff against either party, this is a good cause of challenge. So if the plaintiff or defendant have an action of debt against the sheriff; but otherwise it is, if the sheriff have an action of debt against either party. Or if the sheriff have parcel of the land depending upon the same title. Or if the sheriff, or his bailiff which returned the jury, be under the distrefs of either party. Or if the sheriff, or his bailiff, be either of counsel, attorney, officer, or servant of either party; gossip; or arbitrator in the same manner, and treated thereof. *1 Inst. 156.*

And the subject may challenge the array against the king; as in traverse of an office, he that traverseth may challenge the array: And so it is in case of life. *1 Inst. 156.*

And where a subject may challenge the array, for unindifferency, there the king being a party may also challenge for the same cause. *1 Inst. 156.*

The array challenged on both sides shall be quashed. *1 Inst. 156.*

(2) Challenge to the array, for favour. He that taketh this must shew in certain the name of him that made it, and in whose time, and all in certainty. This kind of challenge, being no principal challenge, must be left to the discretion and conscience of the triers. As if the plaintiff or defendant be tenant to the sheriff, this is no principal challenge, but he may challenge for favour, and leave it to trial. So affinity between the son of the sheriff, and the daughter of the party, or the like, is no principal challenge, but to the Challenge to the array for favour.

the favour; but if the sheriff marry the daughter of either party, or the like, this (as hath been said) is a principal challenge. 1 *Inst.* 156.

But where the king is party, one shall not challenge the array for favour; because in respect of his allegiance, he ought to favour the king more; but if the sheriff be a menial servant of the king, there the challenge is good. 1 *Inst.* 156. By which seems to be meant, that such challenge is not good, without shewing some actual partiality in the sheriff. 2 *Haw.* 419.

But the king may challenge the array for favour. 1 *Inst.* 156.

2. Challenge to the *polls* is threefold:

Peremptory
challenge.

(1) Peremptory. This is so called, because a person may challenge peremptorily, upon his own dislike, without shewing of any cause.

This peremptory challenge shall not be allowed to the king; for it is provided by the 33 *Ed.* 1. *st.* 4. that he who challengeth a juror for the king, shall shew cause, and the truth thereof shall be inquired of. And this extends as well to criminal, as civil causes. However, if the king challenge a juror, he need not shew any cause of his challenge, till the whole panel be gone through, and it appear that there will not be a full jury without the person challenged. And if the defendant, in order to oblige the king to shew cause, presently challenge all the rest, yet it hath been adjudged, that the defendant shall be first put to shew all his causes of challenge, before the king need to shew any. 2 *Haw.* 413.

And this peremptory challenge is not allowable to the party against the king, but only in case of treason or felony, in favour of life. 1 *Inst.* 156.

But in case of treason or felony, the prisoner by the common law might peremptorily challenge 35, which was under the number of three juries.

Challenging a-
bove twenty
jurors.

2. And by 10 & 11 *Car.* 1. *cap.* 9. None that shall be arraigned for high treason, petty treason, murder, man-slaughter, or any other felony, shall be admitted to challenge peremptorily above 20 of their jurors, and, if upon their arraignment or trial, they challenge above that number, persons having authority for the trial of them, may give judgment against them, and award such execution thereupon, as they might if they had challenged peremptorily the number of 36 or more, before the making of this statute.

(2) Principal challenge to the polls: where cause is shewn, but which if found true, stands sufficient of itself, without leaving any thing to the triers.

Causes of principal challenge to the polls, are such as these:

A peer is not to be sworn on juries, and he may be challenged by either party, or may bring a writ of privilege for his discharge. 1 *Inst.* 156. 2 *Haw.* 415.

Want of freehold, is a good cause of challenge. 1 *Inst.* 156.

Also, if a person is an alien. 1 *Inst.* 156.

If the juror be within the age of 21, it is a good cause of challenge. 1 *Inst.* 157.

If a juror be above the age of 70, or is sick, or is non-resident in the county, he may sue out a writ of privilege for his discharge; but if he be returned and appear, he can neither be challenged by the party, nor excuse himself from not serving, if there be not enow without him. 2 *Haw.* 418.

If

If the juror be of blood or kindred to either party, this is a principal challenge; for that the law presumeth that one kinsman doth favour another, before a stranger; and how far remote soever he is of kindred, yet the challenge is good. 1 *Inst.* 157.

Affinity, or alliance by marriage, is a principal challenge, if the same continues, or issue be had; otherwise, it is but to the favour. 1 *Inst.* 157.

And by the 33 *H. 8.* §. 1. c. 4. Consanguinity or affinity being not within the fifth degree betwixt the juror impanelled in any inquest or trial or his wife or any of the parties to the same, or the wife of the same parties, or betwixt the sheriffs, under-sheriffs, coroners, or other officers that shall return or array any panel or jury in any inquest or trial, or the wife of any of them, and any of the parties to the same, or the wife of any of the same parties, shall be no principal challenge. Consanguinity
or affinity.

If the juror be godfather to the child of the plaintiff or defendant, or they to his child, this is allowed to be a good challenge in our books. 1 *Inst.* 157.

If the juror have part of the land that dependeth upon the same title, it is a principal challenge. 1 *Inst.* 157.

It hath been allowed a good cause of challenge, on the part of the prisoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Haw.* 418.

Likewise if the juror gave a verdict before, for the same cause, or upon the same title or matter, though between other persons. 1 *Inst.* 157.

So likewise one may be challenged, that he was indictor of the plaintiff or defendant in the same cause; for such a one, it may be thought, will not falsify his former oath. *Lamb.* 554. And if a grand jurymen, who was one of the indictors in the same cause, be returned upon the petit jury, and do not challenge himself, he shall be fined. 2 *H. H.* 309.

If a juror hath been an arbitrator, chosen by the plaintiff or defendant in the same cause; and hath been informed thereof, or treated of the matter, this is a principal challenge; otherwise, if he were chosen indifferently by either of the parties. 1 *Inst.* 157.

If he be of counsel, servant, or of fee, of either party, it is a principal challenge. 1 *Inst.* 157.

Also, if a jurymen, before he be sworn, take information of the case, this is cause of challenge. 2 *H. H.* 306.

If any, after he be returned, do eat and drink at the charge of either party, it is a principal cause of challenge. 1 *Inst.* 157.

But is not a principal challenge to a juror, but only to the favour, that the prosecutor was lately entertained at his house. 3 *Salk.* 81.

Actions brought either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principal challenge; other actions, which do not imply malice or displeasure, are but to the favour. 1 *Inst.* 157.

In a cause where the parson of a parish is party, and the right of the church cometh in debate, a parishioner is a principal challenge. 1 *Inst.* 157.

If either party labour the juror, and give him any thing to give his verdict, this is a principal challenge; but if either party labour the juror to appear

Jurors.

pear, and to do his conscience, this is no challenge at all, but lawful for him to do it. 1 *Inst.* 157.

That the juror is a fellow servant with either party, is no principal challenge, but to the favour. 1 *Inst.* 157.

If the juror be attainted or convicted of treason or felony, or for any offence to life or member, or in attainr for a false verdict, or for perjury as a witness, or in a conspiracy at the suit of the king, or in any suit (either for the king or for any subject) be adjudged to the pillory, tumbrel, or the like, or to be branded or stigmatized, or to have any other corporal punishment, whereby he becometh infamous; these, and the like, are principal causes of challenge. 1 *Inst.* 158.

So it is, if a man be outlawed in trespass, debt, or any other action, for he is *exlex*, and therefore not a lawful man. 1 *Inst.* 158.

And old books have said, that if he be excommunicated, he could not be of a jury. 1 *Inst.* 158.

3. Challenge to the polls for favour. This is, when either party cannot take any principal challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triers, upon hearing their evidence, to find him favourable, or not favourable. And the causes of favour are infinite. For all which, the rule of law is, that he must stand indifferent, as he stands unsworn. 1 *Inst.* 157.

ii. When the challenge is to be taken.

1. No challenge can be taken either to the array, or to the polls, till a full jury have appeared. 2 *Haw.* 412.

2. He that hath divers challenges, must take them all at once. 1 *Inst.* 158.

3. If a juror be challenged by one party, and after be tried indifferent, it is time enough for the other party to challenge him. 1 *Inst.* 158.

4. After challenge to the array, and trial duly returned, if the same party take a challenge to the polls, he must shew cause presently. 1 *Inst.* 158.

5. If a juror be formerly sworn, if he be challenged, the party must shew cause presently, and that cause must rise since he was sworn. 1 *Inst.* 158.

6. When the king is party, the defendant that challengeth for cause must shew his cause presently. 1 *Inst.* 158.

7. But if a juror be challenged between party and party, and there be enough of the panel besides; the cause of challenge needeth not to be shewed, unless the other side challenges *touts peravail*. *Tr. p. pais* 143.

8. If a man, in case of treason or felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. 1 *Inst.* 158.

9. The prisoner must take all peremptory challenges himself, even in cases wherein he may have counsel. 2 *Haw.* 413.

10. The challenge to the array, must be in writing (C); but where the challenge is to the polls, it is a short way by a verbal challenge. *Tr. p. pais* 172.

iii. How

iii. *How the challenges shall be tried.*

1. The challenge of him who first challenged shall be first tried. *Tr. p. pais 144.*
2. If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two coroners, and sometimes by two of the jury, with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two assigned thereunto by the court. *2 H. H. 275.*
3. When any challenge is made to the polls, if it be before any jurors are sworn, the court shall chuse the triers; if two are sworn, they shall try; and if they try one indifferent, and he be sworn, then he and the two triers shall try another; and if another be tried indifferent, and he be sworn, then the two triers cease, and the two that be sworn on the jury shall try the rest: If the plaintiff challenge ten, and the defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the plaintiff, and another by the defendants. *Finch. 112. 1 Inst. 158.*
4. The triers oath is, "You shall well and truly try, whether *A. B.* (the juryman challenged) stand indifferent between the parties to this issue: so help you God." *1 Salk. 152.*
5. If the cause of challenge touch the dishonour or discredit of the juror, he shall not be examined on his oath; but in other cases, he shall be examined on his oath, to inform the triers. *1 Inst. 158. 1 Salk. 153.*
6. If the array be quashed against the sheriff, the process of *venire facias juratores* shall be directed to the coroners; if against any of the coroners, then process shall be awarded to the rest; if against all of them, then the court shall appoint certain elisors (so named *ab eligendo*), against whose return no challenge shall be taken to the array, because they were appointed by the court; but he may have his challenge to the polls. *1 Inst. 158.*

iv. *How panels may be reformed by the court without challenge.*

Besides the challenges which may be taken by the plaintiff or defendant, it is enacted by the *3 H. 8. c. 12.* that in cases where the king is party, the justices of assize, or of the peace in sessions, may reform the panels of jurors, by putting to and taking out of the names of the persons impanelled by their discretion; and if the sheriff do not return the panel so reformed, he shall forfeit *20 l.* half to the king, and half to him that shall sue.

And this extends both to grand and petit juries. *2 H. H. 156.*

And hence it is, that if a prisoner be arraigned before the judge that sits upon the crown side, it is usual for the judge to send for a jury to the judge of *nisi prius*, and when the jury is brought, the sheriff returns them between the king and the prisoner; which is by virtue of this statute. *2 H. H. 265.*

V. Of the demeanor of jurors in giving their verdict.

Jurors to be kept without meat or drink.

1. By the law of *England*, a jury after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, and without speech with any, unless it be the bailiff, and with him only if they be agreed. 1 *Inst.* 227.

Bailiff sworn to keep them.

2. And the bailiff ought to be sworn to keep them together, and not to suffer any to speak with them. 2 *H. H.* 296.

Whether eating and drinking shall avoid the verdict.

3. And if the jury after their evidence given to them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict; but if before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant it shall not avoid it, and so on the contrary. But if after they be agreed on their verdict, they eat or drink at the charge of him for whom they do pass, it shall not avoid the verdict. 1 *Inst.* 227.

In what cases they may eat or drink.

4. But with the assent of the justices they may both eat and drink; as if any of the jurors fall sick before they be agreed of their verdict, then by the assent of the justices he may have meat or drink, and also such other things as be necessary for him and his fellows also, at their own costs, or at the indifferent costs of the parties, if they so agree: and if they cannot agree, the justices may in such case suffer the jury to have both meat and drink for a time, to see whether they will agree. *Dr. & St.* 158.

May re-examine witnesses.

5. After their departure they may desire to hear one of the witnesses again; and it shall be granted, so he deliver his testimony in open court; and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court. 2 *H. H.* 296.

May hear no evidences but in court.

6. But if the plaintiff after evidence given, and the jury departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in issue, or any evidence, or any writing touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant, and so on the contrary. But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carried it with them. 1 *Inst.* 227.

Cannot be discharged without giving a verdict.

7. A jury sworn and charged in a capital case, cannot be discharged (without the prisoner's consent) till they have given a verdict. 2 *Hawk.* 439. *Fost.* 22. Sir John Wedderbourn's case.

And the king cannot be nonsuit, for he is in judgment of law ever present in court. 1 *Inst.* 227.

May be fined for saying they are agreed, when they are not. Calling lots for their verdict.

8. If a jury say they are agreed, and it being asked who shall say for them, they say their foreman, but upon farther inquiry they are not agreed, they may be fined. 2 *H. H.* 309.

9. If a jury cast lots for their verdict, it shall be set aside, and they shall be fined for the contempt. 3 *Keb.* 805. 2 *Lev.* 140, 205. 2 *Jones* 83.

M. 12 G. Hale and Cove. The jury having sat up all night, agreed in the morning to put two papers into a hat, marked *Plaintiff* and *Defendant*, and so draw lots; *Plaintiff* came out, and they found for the plaintiff, which happened.

happened to be according to the evidence, and the opinion of the judge. Upon motion for a new trial, it was agreed that the verdict must be set aside; but the question was, whether the defendant should pay costs: the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed, that the costs should wait the event of the new trial. *Str.* 642.

10. The jury may give a verdict without testimony, when they themselves have consence of the fact. *Tr. p. pais* 279. *1 Ventr.* 97. Giving verdict without evidence.

11. But if they give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court before they are sworn that they have evidence to give. *1 Salk.* 405. Juror may be a witness.

For certainly it is of dangerous consequence, to receive a verdict against evidence given, on supposal that some of the jury knew otherwise, or on private information given by any jurymen to the rest, where he cannot be cross examined. *Tr. p. pais* 209.

12. After they be agreed, they may in causes between party and party, if the court be risen, give a private verdict, before any of the judges of the court; and then they may eat and drink; and the next morning in open court they may either affirm or alter their private verdict; and that which is given in court shall stand. *1 Inst.* 227. Private verdict.

But in criminal cases of life or member, the jury can give no private verdict, but they must give it openly in court. *1 Inst.* 227.

13. In all causes, and in all actions, the jury may give either a general or a special verdict, as well in causes criminal as civil; and the court ought to receive a special verdict, if pertinent to the point in issue. *3 Salk.* 373. Special verdict.

Thus if one be indicted for grand larceny, that is, for stealing goods above the value of 12*d.* yet the jury may find specially, that he is guilty, but that the goods are not above the value of 12*d.* In which case, he shall only have judgment of petit larceny. *1 Haw.* 95.

14. Jurors are to try the fact, and the judges ought to judge according to the law that ariseth upon the fact. *1 Inst.* 226. Jurors to try not the law, but the fact.

But if they will take upon them the knowledge of the law upon the matter, they may; yet it is dangerous, for if they mistake the law, they run into the danger of an attain: therefore to find the special matter is the safest way, where the case is doubtful. *1 Inst.* 228.

But if the jury find according to the direction of the judge in matter of law, although the judge be mistaken, yet the jury shall not be liable to attain. *L. Raym.* 470.

15. It hath been adjudged, that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again, and re-consider the matter; but this by many is thought hard, and seems not of late years to have been so frequently practised as formerly. However it is settled, that the court cannot set aside a verdict which acquits a defendant, of a prosecution properly criminal, as it seems that they may a verdict that convicts him, for having been given contrary to evidence and the directions of the judge, or any verdict whatsoever for a mis-trial. *2 Hawk.* 442. Finding against evidence.

16. After:

Varying from
the verdict.

16. After the verdict recorded, the jury cannot vary from it; but before it be recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand. 1 *Inst.* 227.

Verdict finding
an impossibility.

17. A verdict finding an impossible matter shall not be void, if at the same time it find the substance of the indictment; but the surplus shall be rejected. 1 *Hawk.* 77.

Verdict how
far to be taken
strictly.

Where they
cannot agree.

18. Verdicts shall not be taken so strictly as pleadings; but the substance of thing in issue ought to be always found. 3 *Salk.* 373.

19. It is said, that if the jurors agree not, before the departure of the justices of gaol delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdict in a foreign county. 2 *H. H.* 297. *Tr. p. pais* 274, 285, 1 *Vent.* 97.

But if the case so happen, that the jury can in no wise agree, as if one of the jurors knoweth in his own conscience the thing to be false, which the other jurors affirm to be true, and so he will not agree with them in giving a false verdict, and this appeareth to the justices by examination; the justices (as it seemeth) in such case may take such order in the matter, as shall seem to them by their discretion to stand with reason and conscience, by awarding a new inquest, or otherwise, as they shall think best by their discretion, like as they may do, if one of the jury die before the verdict. *Dr. & Stud.* 158.

VI. Of the indemnity and punishment of jurors.

Threatning a
juror.

1. If a man assault or threaten a juror, for giving a verdict against him, he is highly punishable by fine and imprisonment; and if he strike him in the court, in the presence of the judge of assize, he shall lose his hand, and his goods, and profits of his lands during life, and suffer perpetual imprisonment. 1 *Hawk.* 57, 58.

Juror not ap-
pearing.

2. Where more than one of the persons returned on a jury do appear, but not a sufficient number to take an inquest, and some of the others come within view of the court, or into the same town in which the court is holden, but refuse to come into the court to be sworn; upon proof of such matter, the court may, at the prayer of the party, order the jurors who appeared, to inquire what is the yearly value of such defaulter's lands, and after such inquiry made, either summon them to appear, on pain of forfeiting such sum as their lands have been found to be worth by the year, or some lesser sum, or impose a fine of the like sum upon them, without any farther proceeding. But it seems, that such juror shall be liable to lose his issues only for such default, and not the yearly value of his lands, unless the party pray it: But a juror who hath actually appeared, and after makes default, is said to be subject to such forfeiture of the yearly value of his lands, whether the party pray it or not; because his contempt appears to the court by its own record: yet even in this case, the court in discretion will sometimes only impose a small fine. Also it seems, that a juror who makes default without ever coming into the town wherein the court is holden, is liable only to lose his issues, or to be amerced, but not to be fined. 2 *Hawk.* 146.

And

And by the 29 G. 2. c. 6. s. 6. In causes of *nisi prius*, every person whose name shall be drawn, and who shall not appear, after being openly called three times, shall on oath made of his having been lawfully summoned, forfeit not exceeding 20*l.* nor less than 40*s.* unless some reasonable cause be proved, by oath or affidavit, to the satisfaction of the judge.

3. If the grand jury at the assizes or sessions will not find a bill, the court may impanel another inquest (by the 3 H. 7. c. 1.) to inquire of their concealments, and thereupon set fines upon them: But it seemeth that fines set upon grand inquests in any other manner, are not warrantable by law; for the privilege of an *Englishman* is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard, if every justice of the peace, or judge of assize, may make the grand jury present what he pleases, or otherwise fine them. 2 H. H. 160, 1.

Whether a grand jury may be fined for not finding a bill.

4. If any juror do take of either party to give his verdict, he shall on conviction by bill or plaint, before the court where the verdict shall pass, forfeit ten times as much as he hath taken, half to the king, and half to him that shall sue. 5 Ed. 3. c. 10. 34 Ed. 3. c. 8. 38 Ed. 3. s. 1. c. 12.

Juror taking a bribe.

5. It seems to be certain, that no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a *criminal* matter, either upon a grand or petit jury; for since the safety of the innocent, and punishment of the guilty, doth so much depend upon the fair and upright proceedings of jurors, it is of the utmost consequence, that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biassed with the fear of being harrassed by a vexatious suit, for acting according to their consciences, the law will not leave any possibility for a prosecution of this kind. And as to the objection, that an attainder lies against a jury for a false verdict in a civil cause, and that there is as much reason to allow of it in a criminal one; it may be answered, that in an attainder in a civil cause, a man's property is only brought into question a second time, and not his liberty or life. 1 Haw. 191. L. Raym. 469.

Whether a juror may be prosecuted for a verdict in a criminal matter.

6. But where the jurors give a false verdict upon an issue joined in any court of record, and judgment thereupon, the party grieved may bring his writ of attainder in the king's bench or common pleas, upon which 24 of the best men of the county are to be jurors, who are to hear the same evidence which was given to the petty jury, and as much as can be brought in affirmation of the verdict, but no other against it. And if these 24, who are called the grand jury, find it a false verdict, then followeth this terrible judgment at the common law upon the petit jury; that the party shall be infamous, so as never to be received to be a witness, or a juror; shall forfeit his goods and chattles; and his lands and tenements shall be taken into the king's hands; his wife and children cast out of doors; his houses prostrated; his trees rooted up; his meadows ploughed up; and his body imprisoned. And seeing all trials of real, personal, and mixt actions depend upon the oath of 12 men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury. 1 Inst. 294. Read. Jur.

Attainder in a civil cause.

But

Jurors.

But now by the statute of 23 *H. 8. c. 3.* The severity of this punishment is moderated, if the writ of attaint be grounded upon that statute; but nevertheless, the party grieved may at his election, either bring his writ of attaint upon that statute, or at the common law. *Tr. p. pais 222.*

But this proceeding seems to be intirely disused at this day; and in the place of attaint motions are now usually made for new trials, when a verdict is against evidence. *Wood b. 4. c. 4. Read. Jur.*

But there can be no new trial for or against the king. *Tr. p. pais 210.*

7. It seems to be the current opinion of the old books, that jurors are not subject to any prosecution for a false verdict except by way of attaint: And there seem to be very few antient precedents for the punishment either of a grand or petit jury, merely for giving a verdict against evidence, or the direction of the court, either in a capital or civil matter. *2 Haw. 147.*

Whether they
may be fined
for their ver-
dict.

And the fining and imprisoning of jurors for giving their verdict, hath several times been declared in parliament an illegal and arbitrary innovation, and of dangerous consequence to the government, and the lives and liberties of the subject. *2 Keb. 180. Read. Jur.*

And in *Busbel's* case, it was resolved by all the judges, upon a full conference together, that a jury is not finable for going against their evidence, where an attaint lies. And where an attaint doth not lie, *L. Vaughan* says thus; "That the court could not fine a jurymen at the common law, where attaint did not lie, I think to be the clearest position that ever I considered, either for authority or reason of law." And one reason for this is, because the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence, than what is shewed in court; they are of the vicinage, the judge is a stranger; they may have evidence from their own personal knowledge that the witnesses speak false, which the judge knows not of; they may know the witnesses to be stigmatized and infamous, which may be unknown to the parties or court. And if the jury knew no more than what they heard in court, and so the judge knew as much as they, yet they might make different conclusions, as oftentimes two judges do; and therefore as it would be a strange and absurd thing, to punish one judge for differing with another in opinion or judgment, so it would be worse for the jury, who are judges of the fact, to be punished for finding against the direction of him, who is not judge of the fact. *Tr. p. pais 225. L. Vaugh. 135.*

And to say the truth, says Lord *Hale*, it would be the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner: and if the judge's opinion must rule the matter of fact, the trial by jury would be useless. *2 H. H. 315.*

But what if a jury gave a verdict against all reason, convicting or acquitting a person indicted of felony, what shall be done? If the jury convict a man, against or without evidence, and against the direction of the court, the court may reprieve him before judgment, and acquaint the king, and certify for his pardon: if the jury acquit him in like manner, the court may send them back again (and so in the former case) to consider better of it, before they record the verdict; but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it. *2 H. H. 309, 310.*

C. Challenge

C. Challenge to the array, because the sheriff is of kindred to one of the parties; from Coke's entries.

AND now at this day, to wit ——— came the aforesaid A. the plaintiff, and B. the defendant, by their attornies, and the jurors were impanelled, and demanded, and came, and thereupon the aforesaid B. challengeth the array of the panel aforesaid, because he said that that panel was arrayed by one John Zouch, knight, now and at the time of making the array aforesaid, sheriff of the said county of Derby, which said sheriff is a kinsman of the aforesaid John Maners (the plaintiff); to wit, the son of George Zouch, esquire, the son of John Zouch, knight, the son of John Zouch, esquire, the son of William Lord Zouch, the son of Alan Lord Zouch, the son of William Lord Zouch, the son of Elizabeth daughter of William Lord Roos, the father of William Lord Roos, the father of Thomas Lord Roos, the father of Eleanor mother of George Maners, knight, the father of Thomas Earl of Rutland, the father of the aforesaid John Maners. And this he is ready to verify, whereupon he prayeth judgment, and that the said panel may be quashed. Which said challenge by ——— and by ——— triers, to this chosen and sworn, is found true. And therefore let the panel aforesaid be quashed and amoved, &c. Tr. per. p. 160.

Challenge because the panel was returned at the instance of the party.

And upon this, the said ——— challenges the array of the said panel, because he says, that that panel was arrayed by one J. S. esquire, late sheriff of the county of ——— aforesaid, at the nomination of the said ——— and in his favour; which said challenge, by triers thereof sworn, is found true.

Justices of the peace.

JUSTICES of the peace are judges of record, appointed by the king, to be justices within certain limits, for the conservation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge. *Dalt. c. 2.*

And a record or memorial made by a justice of the peace, of things done before him judicially in the execution of his office, shall be of such credit, that it shall not be gainsaid. One man may affirm a thing, and another man may deny it; but if a record once say the word, no man shall be received to aver or speak against it; for if men should be admitted to deny the same, there would never be any end of controversies. And therefore to avoid all contention, while one saith one thing, and another saith another thing, the law repositeth it self wholly and solely in the report of the judge. And hereof

Justices of the peace.

it cometh, that he cannot make a substitute or deputy in his office, seeing that he may not put over the confidence that is put in him. Great caule therefore have the justices to take heed that they abuse not this credit; either to the oppressing of the subject by making an untrue record, or the defrauding of the king by suppressing the record that is true and lawful. *Lamb. 63—66.*

Hereof also it cometh, that if a justice of the peace certify to the king's bench, that any person hath broken the peace in his presence, upon this certificate such person shall be there fined, without allowing him any traverse thereto. *Dalt. c. 70.*

And that I may treat intelligibly concerning this office (of which lord *Coke* says the whole christian world hath not the like, if it be duly executed, *4 Inst. 170.*) I will set forth.

I. The office of conservators of the peace at the common law, before the institution of justices of the peace.

II. The commission of the justices of the peace, founded on the statute law.

III. The justice of the peace his oath of office.

IV. Of fees to be taken by justices of the peace.

V. Some general directions relating to justices of the peace, not falling under any particular title of this book.

VI. Their indemnity and protection by the law, in the right execution of their office; and their punishment for the omission of it.

I. The office of conservators of the peace at the common law, before the institution of justices of the peace.

Conservators
by election.

1. Of antient time such officers or ministers, as were instituted either for preservation of the peace of the county, or for execution of justice, because it concerned all the subjects of that county, and they had a great interest in the just and due exercises of their several places, were by force of the king's writ in every several county chosen in full or open county by the freeholders of that county: as before the institution of justices of the peace, there were conservators of the peace in every county, whose office (according to their names) was to conserve the king's peace, and to protect the obedient and innocent subjects from force and violence. These conservators, by the ancient common law, were by force of the king's writ chosen by the freeholders in the county court, out of the principal men of the county; after which election so made, and returned, then in that case the king directed a writ to the party so elected, to take upon him and execute the office, until the king should order otherwise. And thus the coroners still continue to be chosen in full county; as also the knights of the shire for the parliament. *2 Inst. 558, 559.*

2. Besides

Justices of the peace.

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2. Besides these conservators of the peace properly so called, there were ^{Conservators by office.} and are other conservators of the peace by virtue of certain offices: as for instance;

(1) The lord chancellor, and every justice of the king's bench, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizances for it. 2 Haw. 32.

(2) Also, every court of record, as such, hath power to keep the peace within its own precinct. 2 Haw. 32.

(3) Also every justice of the peace is a conservator of the peace. Crom. 6.

(4) Also, every sheriff is a principal conservator of the peace, and may without doubt *ex officio* award process of the peace, and take surety for it. And it seems the better opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation. 2 Haw. 33.

(5) Also, every coroner is another principal conservator of the peace, and may certainly bind any person to the peace, who makes an affray in his presence. But it seems the better opinion, that he has no authority to grant process for the peace; and it seems clear, that the security taken by him for the keeping the peace (except only where it is taken by him as judge of his own court for any affray done in such court) is not to be looked on as a recognizance, but as an obligation. 2 Haw. 33.

(6) Also, every high and petit constable are by the common law conservators of the peace. 2 Haw. 33.

And it is said, that if a constable see persons engaged in an affray, or upon the very point of entering upon it, as where one shall threaten to kill, wound, or beat another, he may imprison the offender of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find surety of the peace by obligation. 1 Haw. 137.

But it is said, that a constable hath no power to arrest a man for an affray done out of his own view; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor doth it follow from his having power to compel those to find sureties who break the peace in his presence, that he hath the same power over those who break it in his absence.

1 Haw. 137.

3. There were also other conservators of the peace by tenure, who held ^{Conservators by tenure.} lands of the king by this service, among others, of being conservators of the peace within such a district. 2 Haw. 33.

4. Also there were other conservators of the peace by prescription; who ^{Conservators by prescription.} claimed such power from an immemorial usage in themselves and their predecessors or ancestors, or those whose estate they had in certain lands, which wholly depended upon such usage, both as to its extent, and the manner in which it was to be exercised. 2 Haw. 33.

Thus it is said, that a mayor of a corporation may be a conservator of the peace by prescription. Crom. 6.

It is questioned indeed by some, whether any such power can be claimed by usage; yet if the power of holding pleas and even of courts of record, which are of so high a nature, and imply a power of keeping the peace within their own precincts, may be claimed by usage, as it seems to be cer-

Justices of the peace.

Power of
conservators.

tain that they may; it seemeth that the bare authority of keeping the peace in a certain district may as well be claimed by such usage. 2 *Haw.* 34.

5. The authority which such conservators of the peace, whether by election, or tenure, or prescription, have at common law, is the same authority which constables of a vill or wapentake have at this day. *Crom.* 6. 2 *Haw.* 34.

Their duty.

6. The general duty of the conservators of the peace by the common law, is to employ their own, and to command the help of others, to arrest and pacify all such who in their presence and within their jurisdiction and limits by word or deed, shall go about to break the peace. *Dalt.* c. 1.

And if a conservator of the peace, being required to see the peace kept, shall be negligent therein, he may be indicted and fined. *Dalt.* c. 1.

And if the conservators of the peace have committed or bound over any offenders, they are then to send to, or be present at, the next sessions of the peace or gaol delivery, there to object against them. *Dalt.* c. 1.

II. Of the commission of justices of the peace.

Justices of the peace at this day are of two sorts; 1. By charter, or grant made by the king under the great seal; as mayors and the chief officers in divers corporate towns. 2. By commission.

At the first, by the statute of the 1 *Ed.* 3. which is the first statute that ordains the assignment of justices of the peace by the king's commission, those justices had no other power but only to keep the peace. But the very next year, the form of the commission was enlarged, and continued still further to be enlarged both in that king's reign, and in the reign of almost every other succeeding prince, until the 30th year of the reign of *Q. Elizabeth*, when by the number of the statutes particularly given in charge therein to the justices, many of which nevertheless had been a good while before repealed, and by much vain repetition, and other corruptions that had crept into it, partly by the miswriting of clerks, and partly by the untoward huddling of things together, it was become so cumbersome and foully blemished, that of necessity it ought to be redressed. Which imperfections being made known to Sir *Chr. Wrey*, then Lord Ch. Justice of the king's bench, he communicated the same with the other judges and barons, so as by a general conference had amongst them, the commission was carefully refined in the *Michaelmas* term, 1590, and being then also presented to the lord chancellor, he accepted thereof, and commanded the same to be used: Which continues with very little alteration to this day. *Lamb.* c. 9.

Which is as follows:

George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To A. B. C. D. &c. greeting.

Know ye that we have assigned you, jointly and severally, and every one of you, our justices to keep our peace in our county of W. And to keep and cause to be kept all ordinances and statutes for the good of the peace, and for preservation

Justices of the peace.

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vation of the same, and for the quiet rule and government of our people made, in all and singular their articles in our said county (as well within liberties as without) according to the force, form, and effect of the same.

And to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done according to the form of those ordinances and statutes.

And to cause to come before you, or any of you, all those who to any one or more of our people concerning their bodies or the firing of their houses have used threats, to find sufficient security for the peace, or their good behaviour, towards us and our people; and if they shall refuse to find such security, then them in our prisons until they shall find such security to cause to be safely kept.

We have also assigned you, and every two or more of you (of whom any one of you the aforesaid A. B. C. D. &c. we will shall be one) our justices to inquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of treasons, murders, man-slaughters, burnings, unlawful assemblies, felonies, robberies, poisonings, incantments, sorceries, art magick, trespasses, forestallings, regratings, ingrossings, and extortions whatsoever.

And of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to inquire, by whomsoever and after what manner soever in the said county done or perpetrated; or which shall happen to be there done or attempted.

And also of all those who in the aforesaid county in companies against our peace, in disturbance of our people, with armed force have gone or rode, or hereafter shall presume to go or ride.

And also of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim or cut or kill our people; And also of all victual-lers, and all and singular other persons, who in the abuse of weights or measures, or in selling victuals against the form of the ordinances and statutes, or any one of them therefore made, for the common benefit of England and our people thereof, have offended or attempted, or hereafter shall presume in the said county to offend or attempt.

And also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers, who in the execution of their offices about the premisses, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be careless, remiss, or negligent in our aforesaid county.

And of all and singular articles, and circumstances, and all other things whatsoever, that concern the premisses or any of them, by whomsoever, and after what manner soever, in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever.

And to inspect all indictments whatsoever so before you or any of you taken or to be taken, or before others late our justices of the peace in the aforesaid county made or taken, and not yet determined; and to make and continue processes thereupon, against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted; until they can be taken, surrender themselves, or be outlawed (except upon indictments of treasons and felonies).

And

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And to hear and determine all and singular the felonies, poisonings, enchantments, sorceries, arts magick, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premisses (except treasons and felonies) according to the laws and statutes of Ireland, as in the like case it has been accustomed, or ought to be done.

And the same offenders, and every of them for their offences, by fines, ransoms, amerciaments, forfeitures, and other means as according to the law and custom of Ireland, or form of the ordinances and statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish.

Provided always, that if a case of difficulty, upon the determination of any the premisses, before you, or any two or more of you, shall happen to arise; then let judgment in no wise be given thereon, before you, or any two or more of you, unless in the presence of one of our justices of the one or other bench, or one of the barons of our Exchequer, or of one of our justices appointed to hold the assizes in the aforesaid county.

And therefore we command you and every of you, that to keeping the peace, ordinances, statutes, and all and singular other the premisses, you diligently apply yourselves; and that at certain days and places, which you, or any such two or more of you as is aforesaid shall appoint for these purposes, into the premisses ye make inquiries; and all and singular the premisses hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of Ireland: Saving to us the amerciaments, and other things to us therefrom belonging.

And we command by the tenor of these presents our sheriff of W. that at certain days and places, which you, or any such two or more of you as is aforesaid, shall make known to him, he cause to come before you, or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premisses shall be the better known and inquired into.

Lastly, we have assigned you the aforesaid A. B. keeper of the rolls of our peace in our said county. And therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined as is aforesaid.

In witness whereof we have caused these our letters to be made patent. Witness, &c.

By the commission of the peace for the county of *Dublin*, the justices of peace have power to hear and determine felonies; and in due manner to deliver the gaol there of prisoners, in the same detained or imprisoned for felony: but in the other they have no power given them thereby to hear and determine of any felony, and the reason of this difference is twofold. First, because no justices of assize and gaol delivery go into the county of *Dublin*. Secondly, because at the quarter-sessions of the peace there is always one or more of the judges or of the king's council present.

The commissions of the peace in this kingdom do differ from the usual commission of the peace in *England* in this particular, *videlicet*, by these commissions, the justices of peace have power to inquire of treason, which the

the justices of peace in *England* by their commission have not. The reason is, because many offences which are common here, are by the laws of this kingdom treason, which by the laws in *England* are but felony.

To A. B. C. D. &c. *greeting*] From the persons here named in the commission, it may be proper to consider, who may, or may not, be justices of the peace.

By the statutes of 13 R. 2. c. 7. and 2 Hen. 5. st. 2. c. 1. The justices shall be made within the counties of the most *sufficient* knights, esquires, and gentlemen of the law.

By the *En. st.* 18 H. 6. c. 11. No justice of peace shall be assigned if he have not lands to the value of twenty pounds by the year. And if any be ordained which hath not lands to the value aforesaid, he shall give knowledge to the chancellor, which shall put another in his place.

And if he give not knowledge as before within a month after he hath notice of such commission, or if he fit or make any warrant by force of such commission, he shall incur the pain of twenty pounds, and be put out of the commission.

And the king shall have half of the said pain, and he that will sue, the other half. And he that will sue for the king and for himself, shall have an action to demand the same pain by writ of debt.

This ordinance shall not extend to cities, towns, or boroughs, which be counties incorporate of themselves, nor which have justices of peace dwelling in the same.

Provided also, that if there be not men sufficient, having lands to the value aforesaid, learned in the law, within such county; the chancellor shall have power to put other discreet persons, learned in the law, in such commissions, though they have not lands to the value aforesaid.

And by the 7 W. c. 13. No sheriff shall exercise the office of a justice of the peace, during the time that he acts as sheriff. And the reason seems to be, because he cannot act at the same time both as judge and officer, for so he would command himself to execute his own precepts. *Dalt. c. 3.*

Also if he be made a *coroner*, this by some opinions is a discharge of his authority of justice. *Dalt. c. 3.*

But if he be created duke, archbishop, marquis, earl, viscount, baron, bishop, knight, judge, or serjeant at law, this taketh not away his authority of justice of the peace. 10 C. 1. st. 2. c. 14. *Dalt. c. 3.*

By *Holt Ch. J.* Though a man be a *mayor*, it doth not follow that he is a justice of the peace, for that must be by a particular grant in the charter. *L. Raym.* 1030. But although he be not a justice of the peace by the charter, yet there are many cases, wherein he hath the same power as a justice of the peace given unto him by particular statutes.

Also by the act 7 G. 2. c. 6. No person converted from the popish to the protestant religion, shall be capable of being or acting as a justice of the peace, whose wife shall be a papist, or who doth educate in the popish religion any of his children, who shall be under the age of sixteen years. *f. 1.*

And any such person acting as a justice of the peace contrary to this act, shall upon conviction suffer one years imprisonment, and forfeit one hundred pounds

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pounds, to be recovered by bill, &c. in any court of record, and shall be for ever incapable of being an executor, administrator, or guardian.

And by the 33 G. 2. c. 13. No person being treasurer of any county, shall, during his continuance in said office, exercise the office of justice of the peace, for such county, for which he is a treasurer.

Know ye that we have assigned you] This is founded on the statute of the 1 Ed. 3. c. 16. viz. For the better keeping and maintenance of the peace, the king will, that in every county good men and lawful, which be no maintainers of evil, or barretors in the country, shall be assigned to keep the peace.

And from this act we are to date that great alteration in our constitution, whereby the election of conservators of the peace was taken from the people, and translated to the assignment of the king. *Lamb. 20.*

And here we may observe, that the commission hath two parts; or consisteth of two different assignments: By this first assignment, any one or more justices have as well all the ancient power touching the peace, which the conservators of the peace had at the common law, as also that whole authority which the statutes have since added thereto. *Dalt. c. 5.*

Jointly and severally, and every one of you] Whatsoever any one justice alone may do, the same also may lawfully be done by any two or more justices; but where the law giveth authority to two, there one alone cannot execute it. *Dalt. c. 6.*

And yet where a statute appointeth a thing to be done by two justices or more, if the offence be any misdemeanor or matter against the peace, there upon complaint made of the offence, to any one of those justices, it seemeth that one of them may grant out his warrant to attach the offender, and to bring him before the same justice and the other justice so appointed (at some convenient place), and then they to hear and determine the same. *Dalt. c. 6.*

But it seemeth, that when a thing is appointed by any statute to be done by or before one person certain, such thing cannot be done by or before any other: and by such express designation of one, all others are excluded, and their proceedings therein are *coram non judice*. *Dalt. c. 6.*

Our justices] In that the king calls them *our* justices, their authority determines of course by his death or demise: so that he being once dead, or having given over his crown, they are no more his justices, and the justices of the next prince they cannot be, unless it shall please him afterwards so to make them. *Dalt. c. 3.*

But by the Br. ft. 6 An. c. 7. No patent or grant of any office or employment in Great Britain or Ireland, shall determine by the king's death or demise, but shall continue in force for six months after, unless, in the mean time, made void by the successor.

Also, before his death or demise, the king may determine the commission at his pleasure; and that either expressed, as by writ under the great seal, or by implication, by making a new commission, and leaving out the former justices

justices names. But until notice, or publishing of the new commission, the acts of the former justices are good in law. *Dalt. c. 3.*

But to mayors and chief officers in corporations, which have the authority of justices of the peace, or of conservators of the peace, by grant under the king's letters patent to them and their successors the authority remaineth, notwithstanding the king's death or demise. *Dalt. c. 3.*

Neither can the king discharge these again at his pleasure; but yet such grants and charters may for some great and general defect or miscarriage, in the execution of the powers therein granted, be repealed, and the liberties seized. *Dalt. c. 3.*

Justices to keep our peace] Although they are in no part of the commission called *keepers of the peace*, yet inasmuch as by the 18 *Ed. 3. c. 2.* they are expressly called *keepers of the peace*, and the principal end of their office is for the keeping of the peace, and their usual description in certioraries is by the name of *keepers of the peace*; it hath been adjudged, that in the caption of an indictment, *keepers of the peace and justices of our lord the king*, is good, without expressly naming them *justices of the peace*. 2 *Haw. 38.*

To keep our peace] These words seem to give them the authority which the conservators of the peace had at common law: and all that follows in the commission, seems an addition to the power of the ancient conservators.

Our peace] It hath been resolved, that the description of justices of the peace, by the name of *justices of our lord the king to keep the peace*, is good, without saying, the *peace of our lord the king*; for that is necessarily implied. 2 *Haw. 38.*

Also, by these words *our peace*, when the king dies, the surety of the peace is discharged; for when he is dead, it is not *his peace*. *Crom. 124.*

In our county of W.] Here are two considerations; One is, that the justice cannot act when he is out of the county; And the other is, that when he is in the county, he can act for that county only, and his power extendeth to no other. But both these are to be understood with some limitations.

As to the former case, when he is out of the county; It is said, that the justices have no *coercive* power when out of the county; and therefore that an order for payment of labourers wages, made by them out of the county, is not binding. Yet it is said, that *recognizances* and *informations* voluntarily taken before them in any place, are good. 2 *Haw. 37.*

And *L. Hale* says, that a justice of the peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons; but that he cannot do a compulsory act, as committing a person for not giving recognizance. 2 *H. H. 50, 51.*

And to keep and cause to be kept all ordinances and statutes for the good of the peace] It seems certain, that by virtue hereof, they may execute all statutes whatsoever, made for the better keeping of the peace, and consequently those of *Winchester* and *Westminster*, and all others concerning the peace, made be-

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fore the reign of *Ed. 3.* in whose time (as hath been said) justices of the peace were first instituted; for all those statutes were expressly mentioned in the ancient commissions of the peace, and have always been undoubtedly taken to be included in these general words of the present commission. And yet none of the statutes which ordain the office of justices of the peace, say any thing concerning the execution of the said former statutes; so that the power of justices of the peace in relation to those statutes seems entirely to depend on the king's commission, and yet hath always been unquestionably allowed. From whence it appears, that regularly the king, by his commission, may authorize whom he pleases to execute an act of parliament. *2 Haw. 37.*

But if no power be expressly given in any such statute to any one justice alone, he cannot proceed upon it, but he may prefer the cause at the sessions, and work it to a presentment upon the statute. *Dalt. c. 5.*

But besides the statutes relating to the peace, there are also many other statutes which are not specified in the commission, and yet are committed to the charge and care of the justices of the peace, by the express words of such statutes; and all such statutes are to them a sufficient warrant and commission of themselves, altho' they be not recited in the commission, and are to be executed by them, according as the same statutes themselves do severally prescribe and set down. *Dalt. c. 5.*

Statutes for the good of the peace] Altho' a præmunire is not within the letter of the commission, yet inasmuch as it is against the peace of the king and of the realm, any justice may cause a person to be apprehended for such offence, and take his examination, and informations against him, and certify the same to the king's bench or gaol delivery. *2 Haw. 39.* And the same may be said of other like offences.

And for the quiet government of our people] Of our people;—yet it seemeth, that the subjects of a foreign prince coming into *England*, and living under the protection of our king, shall be subject to, and have the benefit of the laws, in respect of the local allegiance which they owe to him. *2 Haw. 35. 1 H. H. 93, 94.*

As well within liberties as without] By these words shall be intended such liberties and franchises which have return of writs, and not such as are counties of themselves, as *London, Norwich, York*, and such like. *Crom. 8.*

But yet from hence it seems clearly to follow, that they may execute their office within a town (not being a county of it self) altho' it have a special commission of the peace for its own limits, unless such commission have a clause, that no other justices except those named in it, shall any way concern themselves in the keeping of the peace within the liberties of such town; And it may be questioned, whether such a special clause in such a commission do absolutely make void the act of any county justice within such town; since the commission for the county seems as fully to give those named in it a jurisdiction over all such towns within the precinct of it, as such commission for a town doth exclude them. And the justice for the county seem to be under no necessity of informing themselves of the contents of a commission, which they have nothing to do with. Yet if they have

have exprefs notice given them of fuch a reſtraining claufe, and proceed to act within fuch town in defiance of it, they may perhaps be puniſhable for their contempt of the king's prohibition; and yet perhaps it may be queſtioned whether their acts be void, for the reaſons abovementioned. 2 *Haw.*

37. And lord *Hale* treating on the ſame ſubject, ſays, if the king by charter grant to a corporation, that the mayor, and recorder, or other, ſhall be juſtices within the ſame; yet if there be no words of excluſion, the juſtices of the county have a concurrent juriſdiction: But if this franchise of being juſtices be granted, *ſo that the juſtices of the county ſhall not intermeddle (ſe non intromittant)*; then tho' a ſubſequent commiſſion be granted in the county at large, it ſeems they have no juriſdiction in this corporation or town; yet it is queſtionable, whether an indictment in the franchise be void, or only a contempt in the juſtices. 2 *H. H.* 47.

Concerning their bodies] *Lambard* and *Dalton* both think it ſeems clear, that if a man is in fear that another will hurt his ſervants, or cattle, or other goods, the ſurety of the peace ſhall not be granted; but Mr. *Dalton* is of opinion, that if one threatens to hurt a man's wife, or child, he may crave the peace by virtue of theſe words. *Lamb.* 82. *Dalt. c.* 116.

Have uſed threats] It ſhould ſeem from the many cauſes which from time to time have been adjudged ſufficient to bind to the good behaviour, that this expreſſion is not to be underſtood of words only, but of threatening actions likewise, or any thing whereby a man has juſt cauſe to apprehend the burning of his houſes, or ſome bodily hurt to be done to him.

To find ſufficient ſecurity] This is done by recognizance; by a reaſonable intendment of law, more than by any eſpecial law in that caſe provided. *Crom.* 125.

For the peace or their good behaviour] Lord *Hale* ſpeaking of the ſtatute of the 34 *Ed. 3. c. 1.* (on which Mr. *Crompton* ſays the power of juſtices to bind to the good behaviour is grounded) ſays, that this power of binding, tho' expreſſed generally, and without any time limited, yet is not intended to be perpetual, but in nature of bail, viz. to appear at ſuch a day at their ſeſſions, and in the mean time to be of good behaviour. 2 *H. H.* 136.

In our priſons] The king's priſon is the common gaol of the county: But by ſundry particular ſtatutes, the juſtices may commit vagrants and other criminals, and perſons charged with ſmall offences, either to the gaol, or to the houſe of correction, by their diſcretion, for ſuch offences, or for want of ſureties.

We have alſo aſſigned you, and every two or more of you] Here beginneth the ſecond part of the commiſſion, or the ſecond aſſignment: All the buſineſſes within which aſſignment belongeth to the ſeſſions of the peace. *Dalt.*

r. 5. And by this it appeareth, that two juſtices may hold a ſeſſions, but that one juſtice cannot. *Crom.* 6, 7.

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Of whom any one of you the aforesaid A. B. C. D. &c. we will shall be one] This clause, which gives power to two or more justices to hear and determine offences, requires that at least one of those justices be of that select number, which is commonly termed of the *Quorum* (from that word in the *Latin* commissions, *Quorum—unum est volumus.*) For those of the *Quorum* were wont to be chosen specially for their knowledge in the laws: And this was it which led the makers of several ancient statutes expressly to enact, that some learned in the laws should be put into the commission of the peace; and (to say the truth) all statutes that require the presence of the *quorum*, do secretly signify such a learned man. For albeit that a discreet person (not conversant in the study of the laws) may sufficiently follow sundry particular directions concerning the service of the peace; yet when the proceeding must be by way of presentment or indictment, upon the evidence of witnesses, and oaths of jurors, and by the order of hearing and determining, according to the straight rule and course of the law, it must be confessed that learning in the laws is very necessary. *Lamb.* 48, 49.

But learning being now greatly advanced and improved since the first institution of this office, this distinction is not of much use, but all or most of the justices are now equally assigned to be of the *quorum*.

By the oath of good and lawful men] That is, by a jury sworn.

Of all and all manner of felonies] That is, either by the common law, or by statute. *Crom.* 8.

Poisonings] The word in the latin commissions was *veneficia*; and before the statute of the 9 *G. 2. c. 5.* which abolisheth witchcraft, was in the *English* translations rendred witchcrafts.

Inchantments, forceries, arts magick] These also are abolished by the said statute, which enacts, that no prosecution shall thereafter be commenced against any person, for witchcraft, forcery, enchantment, or conjuration.

And from the words continuing in the commission, when the crime itself is abolished, we may observe the averfeness in the superior courts from altering ancient forms.

Trespases] This is founded on the statute of the 34 *Ed. 3. c. 1.* which enacts, that the justices assigned shall have power to restrain the offenders, rioters, and all other barators, and to chastise them according to their trespass or offence.

And upon this Mr. *Hawkins* observes, that the word *trespass* is of a very general extent, and in a large sense not only comprehends all inferior offences, which are properly and directly against the peace, as assaults and batteries, and such like, but also all others which are so only by construction; as all breaches of the law in general are said to be. Yet it hath been of late settled, that justices of the peace have no jurisdiction over forgery or perjury at the common law; the principal reason of which resolution, he says, as he apprehended was, that inasmuch as the chief end of the institution of the

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the office of these justices was; for the preservation of the peace against personal wrongs, and open violence; and the word *trespass* in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like, which on this account have been adjudged indictable before justices of the peace. 2 *Haw.*

40.

The word for trespasses in the old latin commissions, is *transgressiones*.

Extortions] The intent of this word is, to inquire of those who have done excessive wrongs; for wrong done by any one is properly trespass, but excessive wrong done by any one is called extortion; and this is more properly in officers, as sheriffs, mayors, bailiffs, escheators, and other officers whatsoever (as well spiritual as temporal) who by colour of their office have done great oppression and excessive wrong to the king's subjects, in taking excessive rewards or fees for doing their offices. *Crom.* 8.

The justices have no express power given them over this offence by any statute; upon which Mr. *Hawkins* observes, that justices of the peace have jurisdiction of all inferior crimes within their commission, whether such crimes be mentioned in any statute concerning them or not; for that all such crimes are either directly, or at least by consequence and judgment of law, against the peace: And upon this ground principally, he says, as he apprehended, it was lately resolved, that they may take an indictment of *extortion*. 2 *Haw.* 40.

And of all and singular other crimes and offences of which the justices of our peace may or ought lawfully to inquire] Which general words seem to include the vast number of offences over which they have a jurisdiction given them by many statutes, and which are not particularly mentioned in the commission.

And also of all those who in companies against our peace in disturbance of our people with armed force have gone or rode] By these words they are to inquire of riots, routs, and all unlawful assemblies. *Crom.* 8.

Weights or measures] This clause was first established by the 34 *Ed.* 3. c. 5. And they have further power given herein by several subsequent statutes, all which statutes must be strictly pursued in relation to the several offences.

Selling victuals] Over this they have a jurisdiction given them, by the *En. st.* 13 *R.* 2. c. 8. which enacts, that victuallers shall have reasonable gains, according to the discretion of the justices of peace, and no more, upon pain to be grievously punished according to the discretion of the justices, where no pain is limited in certain.

And also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers, who in the execution of their offices have unduly behaved themselves]

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selves] This clause is as ancient as the 4 *Ed. 3. c. 2.* on which it is founded.

And it hath been suffered to remain in the commission, not as of any necessity at all (since it is incident to every court of record to do correction upon whatsoever officers and ministers do serve them), but only for the plainer declaration of the power of these justices in that behalf, and for the more assured terrifying of such as shall either of contempt or negligence, do that which is amiss. *Lamb. 49.*

And to inspect all indictments so before you taken] But they cannot proceed upon indictments taken before coroners, or justices of oyer and terminer or gaol delivery; but on indictments taken before the sheriff in his turn they may proceed. *Hale's Pl. 168.*

Or before other late our justices] This is founded on the statute 11 *H. 6. c. 6.* which enacts, that no indictment, plea, suit, or process shall be discontinued by a new commission: but the justices in the new commission, after they shall have the records of the same pleas and processes before them, shall have power to continue the said pleas and processes, and to hear and finally to determine the same, as the former justices might have done.

And by the 10 *C. 1. sess. 2. c. 14. s. 8.* No process or suit before any justices of peace, or other of the King's commissioners, shall be discontinued by the making of a new commission or association, or by altering of the names of the justices or other the King's commissioners; but the new justices and commissioners may proceed, as if the old commissions and justices and commissioners had remained.

And to make and continue processes] This is by *venire, distringas, capias*, or *exigent*, as the case shall be. And it differs from a warrant, in that a warrant is only to attach and convene the party before indictment, and may be either in the name of the king or of the justice; but the process issues after indictment, and must be in the name of the king only. *Dalt. c. 193.*

Until they can be taken, surrender themselves, or be outlawed] For the process is sent out to this end, that either the party shall come in, to answer and to be justified by the law; or else that he shall for his contumacy be deprived of the benefit of the law. *Lamb. 521.*

Or be outlawed] It is observable that the power of the justices stops here, and goes no further; so that they cannot make out a *capias utlagatum*, but the outlawry must be certified into the king's bench. *Lamb. 521. 2 H. H. 52.*

But by the 12 *Co. 103.* they that have power to award process of outlawry, have also a power to award a *capias utlagatum*, as incident to their authority and jurisdiction.

Hear and determine] This power was first given to them by the statute of the 18 Ed. 3. st. 2. c. 2. and afterwards confirmed and enlarged by divers other statutes.

Yet this clause doth not in propriety make the justices of the peace justices of oyer and terminer, because that is a distinct commission; and therefore a statute limiting an offence to be heard and determined before justices of oyer and terminer, gives not the power therein to justices of the peace. *Hale's Pl.* 165.

And thereupon it is said, that although they have power to hear and determine felonies, yet they cannot deliver a person suspected thereof by proclamation (as justices of gaol delivery may) until an inquisition taken; but if an inquisition be taken, and an *ignoramus* found, they may deliver him as it seemeth. 2 *H. H.* 46, 47.

Likewise, although commissioners of oyer and terminer may indict and try at the same sessions, yet it hath been ruled otherwise in case of justices of the peace, unless by consent; but certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony. 2 *H. H.* 48.

By fines, ransoms, amerciaments, forfeitures, and other means — to chastise and punish] Hereby the justices are now armed with far more ample authority and power, than the ancient conservators of the peace were; for they had no power to convene the offender before them, nor to examine, hear, or determine the cause, nor to punish except in some few cases as mentioned before. *Dalt. c.* 6.

But the justices may not award any recompence to the party wronged, otherwise than by persuasion. *Dalt. c.* 5.

Nevertheless, these words are inserted, not as of necessity (for the punishment of all offenders is implied in the word *determine*), but for the plainer declaration of the justices power, and for the more assured terrifying of offenders. *Lamb.* 49.

If a case of difficulty shall happen to arise] That is a difficulty in point of law. *Crom.* 6.

Then let judgment in no wise be given] But yet if they list to proceed without the judge's advice, their judgment is not void: but it standeth good and effectual, until it be reversed by a writ of error. *Lamb.* 50.

At certain days and places] That is, when they hold their sessions; which they are impowered and required to do, by several statutes.

Lastly, we have assigned you the aforesaid A. B. keeper of the rolls] This is in pursuance of the statute of the 37 *H.* 8. c. 1. which enacts, that the lord chancellor shall by commission assign such person to be *custos rotulorum* as the king shall by writing under his hand appoint.

Justices of the peace.

III. *The justice of the peace his oath of office.*

On renewing the commission of the peace (which generally happeneth as any person is newly brought into the same) there cometh a writ of *dedimus potestatem* directed out of chancery, to some ancient justice (or other) to take the oath of him which is newly inserted, which is usually in a schedule annexed; and to certify the same into that court, at such a day as the writ commandeth. *Lamb. 53.*

The form of which oath of office at this day is as followeth:

Ye shall swear, that as justices of the peace in the county of W. in all articles in the king's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of the realm, and statutes thereof made: And ye shall not be of counsel of any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments that shall happen to be made, and all forfeitures which shall fall before you, ye shall cause to be entred without any concealment (or embezilling) and truly send them to the king's exchequer. Ye shall not let, for gift or other cause, but well and truly ye shall do your office of justice of the peace in that behalf: And that you take nothing for your office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute. And ye shall not direct, nor cause to be directed, any warrant (by you to be made) to the parties, but ye shall direct them to the bailiffs of the said county, or other the king's officers or ministers, or other indifferent persons, to do execution thereof. So help you God.

This oath seems to be founded on the statute of the 13 R. 2. c. 7. which enacts, that the justices shall be sworn, duly and without favour, to keep and put in execution all the statutes and ordinances touching their offices.

Beside this oath of office, he must within six months after, take also the oaths of allegiance, supremacy, and abjuration, and make and subscribe the declaration against transubstantiation, at the sessions, as other persons admitted to offices.

IV. *Of fees to be taken by justices of the peace.*

In the oath of office abovementioned are these words; *And that you take nothing for your office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute.*

And by the 3 G. 2. c. 16. No person acting as a justice of the peace within any county, county of a city or town, or any liberty or franchise within this kingdom, other than the justices of his Majesty's court of king's-bench, shall for the execution of his said office, demand or receive any other than

than the fees following, that is to say, six pence for each warrant, and for every recognizance one shilling. *f. 1.*

And no fee or reward shall be received by any justice of the peace for any warrant, recognizance, *mittimus*, discharge, or any other act to be done by such justice in the execution of his office, other than as aforesaid; nothing herein contained shall be construed to enable any justice of the peace to take any fees in any case of felony or treason.

Where any persons pretending to be, or acting as clerks under such justices of the peace, shall take or receive any fee or reward for his trouble, or on any other pretence in respect of his acting as clerk as aforesaid, such person for every such offence, shall forfeit forty shillings to the party who shall first give information in writing of any such offence, before any justice of the peace or chief magistrate of any city, town, or borough, to be recovered by civil bill in the same manner that small debts in a summary way are recoverable, provided such information be made within a month after the offence committed. *f. 2.*

V. Some general directions relating to justices of the peace, not falling under any particular title of this book.

1. Regularly, justices of the peace ought not to execute their office, in their own case; but cause the offenders to be convened or carried before some other justice, or desire the aid of some other justice being present. Justice being a party.

Dalt. c. 173.

By *Holt Ch. J. M. 10 W.* The mayor of *Hereford* was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court.

1 Salk. 396.

H. 3. An. The case of *Foxham* tithing in the county of *Wilts.* A justice of the peace was surveyor of the highways, and a matter which concerned his office coming in question at the sessions, he joined in making the order, and his name was put in the caption. But by *Holt Ch. J.* It ought not to be; as if an action be brought by my lord chief justice *Trevor* in the court of common pleas, it must be before *Edward Nevill*, knight, and his associates, and not before *Thomas Trevor, &c.* And it was quashed. *2 Salk. 607.*

And lord chief justice *Raymond*, who had an estate in the parish of *Abbots Langley*, went off the bench, when an order relating to a pauper there came before the court. *Str. 1173.*

And yet if the justice shall deal in his own case, it seems in some cases justifiable; as when a justice shall be assaulted, or (in doing his office especially) shall be abused to his face, and no other justice present with him; then it seems he may commit such offender until he shall find sureties for the peace or good behaviour, as the case shall require: But if any other justice be present, it were fitting to desire his aid. *Dalt. c. 173. Str. 420, 421.*

And as it is unjust in many cases for the magistrate to act in his own cause, so it is also imprudent: To which purpose the advice of lord *Coke* is applicable,

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cable, who upon the occasion of mentioning a certain judge, who made a settlement of his estate which was void in law, and brought an action in his own name, which all the other judges, of his own shewing in the court, were of opinion did not lie, makes this observation, that it is not safe for any man (be he never so learned) to be of counsel with himself in his own cause, but to take advice of other great and learned men; and the reason he gives is, for that men are generally more foolish in their own concerns, than in those of other people. *1 Inst.* 377.

Acting without
authority.

2. If a justice exceed his authority, in granting a warrant, yet the officer must execute it, and is indemnified for so doing; but if it be in a case wherein he hath no jurisdiction, or in a matter whereof he has no cognizance, the officer ought not to execute such warrant; so that the officer is bound to take notice of the authority and jurisdiction of the justice. *Cro. Car.* 394. *10 Co.* 76.

Thus if a justice send a warrant to a constable to take up one for slander, or the like, the justice hath no jurisdiction in such cases, and the constable ought to refuse the execution of it. *Wood. b. 1. c. 7.*

To condemn
no man un-
heard.

3. In summary convictions, the party ought to be heard, and for that purpose ought to be summoned in fact; and if the justice proceed against a person without summoning him, it would be a misdemeanor in him, for which an information will lie. *1 Salk.* 181. *L. Raym.* 1407. *Str.* 678.

But before an information is granted, the court will first require, that the conviction be removed before them. *Str.* 915.

Refusing to
proceed in a
cause depending
before them.

H. 7 G. K. against *Newton* and others. By the *Br. ft. 1 G. c. 13. f. 11.* it is enacted, that two justices may summon any person to take the oaths before them; and if they do not appear, then on oath of serving such summons, the justices are to certify the same to the quarter-sessions, where if the party so summoned doth not appear to take the oaths, he shall stand convicted of recusancy. The defendants were justices of the peace, and issued their summons accordingly; but coming afterwards to understand, that the party was a gentleman of fashion, and not suspected to be against the government; lest a transaction of this nature should be an imputation upon him, they refused to give the prosecutor his oath of the service of such summons, that the matter might go no further. And now upon motion against them for an information, the court declared, that the justices had no discretionary power to refuse to put the act in execution, and therefore granted an information against them. *Str.* 413.

4. Where a special authority is given to justices out of sessions, it ought to appear in their orders, that that authority was exactly pursued. *2 Salk.*

To make a re-
cord of their
proceedings.

5. In all cases where justices may hear and determine out of sessions (*viz.* on their own view, or confession, or oath of witnesses) the justices ought to make a record in writing under their hands of all the matters and proofs, which record notwithstanding in many cases they may keep by them. *Dalt. c. 115.*

To estreat
fines.

6. And if upon such conviction, the offender is to be fined to the king, then the justices are to estreat such fine, and to send the estreat into the exchequer, whereby the barons of the exchequer may cause the said fine or forfeiture to be levied for the king's use. *Dalt. c. 115.*

7. Lord

7. Lord *Hale* says (contrary to the opinion of lord *Coke*) that the justices out of sessions may issue their warrants for apprehending persons charged of crimes within the cognizance of the sessions, and bind them over to appear at the sessions, although the offender be not yet indicted. 1 *H. H.* 579.

Whether a justice may issue his warrant for offences cognizable only in the sessions.

But in another place he says, this seemeth doubtful; and that one thing which seems to make against it is, that in most cases of this nature, though the party were indicted, or an information preferred, yet a *capias* was not the first process, but a *venire facias*, and *distringas*. 2 *H. H.* 113.

And Mr. *Hawkins* on this point saith thus: It seems that anciently no one justice could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognizable only by a sessions of two or more justices; for that one single justice hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it; yet the long, constant, universal, and uncontrolled practice of justices of the peace, seems to have altered the law in this particular, and to have given them an authority in relation to such arrests, not now to be disputed. 2 *Haw.* 84.

8. Forasmuch as most of the business of a justice of the peace, consisteth in the execution of divers statutes, which cannot be sufficiently abridged but that they will come short of the substance and body thereof; therefore it shall be safest for the justices to have an eye to the statutes at large, and thereby to take their further and better directions, for their whole proceedings: for (as lord *Coke* observeth) abridgments are of good and necessary use to serve as tables, but not to ground any opinion, much less to proceed judicially upon them. *Dalt. c.* 173.

Not to trust to abstracts and abridgments.

9. In like manner, it is not safe for them to trust altogether to the care and judgment of their clerks, in drawing warrants and other instruments; much less, to the skill of parish officers in making copies of orders, and the like: but rather it is adviseable to have good printed forms; and instead of copies to be taken upon occasion, to make out duplicates.

Not to trust to clerks and transcribers.

VI. Their indemnity and protection by the law in the right execution of their office; and their punishment for the omission of it.

1. A justice of the peace is strongly protected by the law, in the just execution of his office. His indemnity.

Thus in the first place, he is not to be slandered or abused; as appears by the following report: *M. 11 G. Aston and Blagrove*. The plaintiff declared, that he was a justice of the peace, and that upon a *colloquium* of him and the execution of his office, the defendant said, *You are a rascal, a villain, and a liar*. After verdict for the plaintiff it was moved in arrest of judgment, that these words are not *actionable*. It was urged for the plaintiff; There is a great difference between magistrates and common tradesmen: words of the latter, must affect them in their particular way of dealing; but any thing that tends to impeach the credit of the former, is *actionable*: And although an *indictment* might not lie for these words, as perhaps not tending to a breach of the peace, yet nevertheless they are *actionable*; for in many cases words are *actionable*, which are not indictable. After consideration

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deration, *Pratt* Ch. J. delivered the opinion of the court, that though *rascal* and *villain* were uncertain, yet being joined with *liar*, and spoken of a justice of the peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff. *Str.* 617. *L. Raym.* 1369.

Afterwards, *T.* 15 G. 2. *Kent* and *Pocock*. These words spoken of a justice of the peace in the execution of his office, and relating thereto, were held, actionable, viz. *Mr. Kent is a rogue*; according to the aforesaid case of *Aston* and *Blagrove*. *Str.* 1168.

E. 7 G. K. and *Revel*. The defendant was indicted, for saying of Sir Edward Lawrence a justice of the peace, in the execution of his office, *You are a rogue and a liar*. It was moved, after verdict for the king, in arrest of judgment, that though the justice might have committed him for the contempt, yet the words are not indictable, since it is not to be presumed they would provoke the justice to a breach of the peace, which is the reason why indictments have been held to lie for words. But by the court, The allowing he might be committed, shews they were indictable. It is true, the justice may make himself judge, and punish him immediately; but still, if he thinks proper to proceed less summarily by way of indictment, he may. The true distinction is, that where the words are spoken in the presence of the justice. there he may commit; but where it is behind his back, the party can be only indicted for a breach of the peace. Judgment for the king. *Str.* 420.

T. 14 G. 2. *K.* and *Pocock*. An information was moved for against the defendant, on account of words spoken of Mr. Kent a justice of the peace. And the affidavit stated, that in a conversation about a warrant granted by Mr. Kent, the defendant asked, if Mr. Kent was a sworn justice; and being answered, to be sure he was, else he would not act, the defendant replied, *If he is a sworn justice, he is a rogue, and a forsworn rogue*. To this it was objected, that the words were not spoken to him in the execution of his office, but only in relation to what he had formerly done: And by the court, There ought to be no information; it is not the same insult and contempt, as if spoken to him in the execution of his office, which would make it a matter indictable. *Str.* 1157.

Nevertheless, according to the distinction in the aforesaid case of *Aston* and *Blagrove*, although an information or indictment might not lie, yet it doth not follow but that the words were actionable; and so it seemeth to have been held in the case last but one abovementioned, of *Kent* and *Pocock*, which seemeth to have been no other than an action brought for this very same offence, after it had been determined that an information would not lie.

In the next place; he is not punishable at the suit of the party, but only at the suit of the king, for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other; for regularly no man is liable to an action for what he doth as judge: but in cases wherein he proceeds ministerially, rather than judicially, if he acts corruptly; he is liable to an action at the suit of the party, as well as to an information at the suit of the king. 2 *Haw.* 85.

And by the 10 C. 1. §. 2. c. 16. It is enacted, that if any action shall be brought against a justice for any thing done by virtue of his office, he may plead

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plead the general issue, and give the special matter in evidence; and if he recovers, he shall have double costs.

And such action shall not be laid, but in the county where the fact was committed.

Moreover, if a justice will not, on complaint to him made, execute his office, the party grieved may complain to the judges of assize, or to the lord chancellor; and upon examination, if it appeareth that the complaint is true, the chancellor may put him out of the commission, and he shall be punished moreover according to his desert. *Crom. 7.*

But the most usual way of compelling them to execute their office in any case, is by a writ of *mandamus* out of the king's bench.

And in actions brought against justices, they are obliged to shew the regularity of their convictions; and the informations laid before them, upon which the convictions are grounded, must be produced and proved in court. *Seff. Caf. V. I. p. 372. Hill and Bateman. 12 G.*

Also, by the 1 G. 3. c. 11. s. 1. If any justice of peace, acting under the charters of cities and towns corporate, shall wilfully commit any offence, contrary to his duty as a justice of peace, every such justice shall, upon conviction of such offence on an information to be filed in the court of *King's Bench*, be for ever disabled to act as a justice of the peace, for or within such city or town corporate, in case the court before whom such information shall be tried, shall, in open court, before the same is adjourned, certify under their hands, that they are satisfied with the verdict given upon such information.

The trial of all such informations shall be had in some indifferent county, to be appointed by the court of *King's Bench*. s. 2.

Nothing in this act contained, shall extend to justices of the peace, appointed by virtue of any commission of the peace, issued or to be issued by his Majesty, his heirs and successors. s. 3.

Lamps.

- I. *Erecting lamps in market-towns.*
- II. *Valuation of houses for lamp-money.*
- III. *Applotting and levying lamp-money.*
- IV. *Penalty for breaking or extinguishing lamps.*

I. *Erecting lamps in market-towns.*

BY the 33 G. 2. c. 18. It shall be lawful for the chief magistrate of every city or town corporate, and for two justices of the peace of the county in which any market-town, not being a city or town corporate, shall lie, by order in writing, under their respective hands, to be posted up in the most publick part of such city, town corporate, or market-town, at least six days before the day of meeting, to appoint a day and place within such city, town corporate, or market-town, for the inhabitants to meet and assemble, in order to consider and determine upon the necessity or expediency of

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of erecting lamps in such city, town corporate, or market-town, at which meeting, such chief magistrate or justices shall respectively preside. *f. 28.*

(2) And every inhabitant being the head of a family, and paying five pounds yearly rent, or upwards, or being occupier of a house within such city, town corporate, or market-town, of such yearly value as aforesaid, may appear, and give his reasons and vote, for or against erecting such lamps.

(3) And in case it shall be determined by a majority of such inhabitants, then and there assembled, that lamps shall be erected in such city, town corporate, or market-town, the said chief magistrate, and the justices of the peace respectively, and such inhabitants qualified to vote as aforesaid, or the major part of them, may at the said assembly, or some adjournment thereof, to such time as the major part of such inhabitants shall agree upon, determine the sort, and number of such lamps, and in what places, and in what manner, and at what distances the same shall be set up, and on what nights, and for what hours in such nights the same shall be lighted and kept burning.

(4) And shall make an estimate of the cost of such lamps, irons, and posts, where necessary, and of the oil, wick, and all other materials for such lamps, and of the expence and salaries of lamp-lighters, and all other expences relative to the lighting, snuffing, cleansing, maintaining, and repairing the same.

II. Valuation of houses for lamp-money.

1. By the 33 G. 2. c. 18. Such chief magistrate and justices respectively, and such inhabitants so assembled, or the major part of them, may at such assembly, or at some such adjournment thereof as aforesaid, or at any other assembly to be convened upon such notice, and in such manner as aforesaid, nominate and appoint five or more discreet and judicious persons, inhabitants of such city, town corporate, or market-town, to be valuers, to value and estimate the yearly value of every house in such city, town corporate, or market-town. *f. 29.*

(2) Which valuation, the said valuers so to be appointed, or the major part of them, shall return in writing under their hands, to such chief magistrate or justices, and shall at the foot of such return, make an affidavit in writing, before such chief magistrate or justices, that the same is a fair, just, full, and indifferent valuation, to the best of their skill and judgment; which affidavit such chief magistrate or justices are empowered to take.

(3) Which valuation and affidavit shall be lodged in the hands of such chief magistrate, or one of such justices; and after the same shall be so made and returned, the like notice, as aforesaid, shall be posted up for such inhabitants qualified to vote as aforesaid, to meet and assemble, in order to consider of, and alter or confirm such valuation; and such valuation as shall be settled and agreed upon at such assembly, by the major part of the inhabitants that shall be so assembled, shall be final and conclusive to the respective owners and occupiers of such houses, as to all purposes of this act.

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2. Provided, that as often as any new houses shall be from time to time hereafter built within any such city, town corporate, or market-town, lighted by lamps so erected, every such new built house shall be valued in manner herein before directed. *f. 32.*

(2) And every such house so valued, shall be chargeable according to such valuation, and the occupier thereof shall pay, or on refusal be compelled to pay the sum so charged thereon, in the same manner, as the occupiers of houses originally valued according to the direction of this act.

(3) And if by increase of such new built houses, it shall be found convenient to erect a greater number of lamps, it shall be lawful for every such city, town corporate, or market-town, to increase the number of such new lamps, in the same manner as before directed.

3. Every house, so valued, shall be and remain charged and chargeable with such yearly sum as the same shall be so valued at, so long as the lamps shall be continued for lighting such city or town, according to the directions of this act, and no longer. *f. 31.*

III. Applotting and levying lamp-money.

1. By the act 33 G. 2. c. 18. And the said inhabitants, qualified to vote as aforesaid, to be assembled upon such notice, and in such manner as aforesaid, or the major part of them, may, from year to year, appoint two or more substantial inhabitants of such city, town corporate, or market-town, to be overseers for the erecting, maintaining, lighting, and keeping in repair the said lamps, and to applot on every such house a proportionable part of the expence attending such lamps. *f. 29. § 4.*

(5) And such overseers as shall be appointed as aforesaid, shall, as often as thereunto required, account before the said chief magistrate and justices respectively, and such inhabitants as aforesaid, for all receipts and disbursements by them, in execution of the powers in them vested by this act. *Ibid. § 5.*

(6) And in case any overseer shall be removed from his office, or die within the year, then such chief magistrate and justices respectively, and such inhabitants, so as aforesaid assembled, or the major part of them, may appoint one other substantial inhabitant of such city, town corporate, or market-town, in the room of the person so dying or removed, to be an overseer for the remainder of such year; which person so appointed, shall have the same powers, as if he had been originally appointed according to the directions aforesaid. *Ibid. § 6.*

2. Every the occupiers of such houses, shall be rateably charged in proportion to such valuation, with the yearly sum to be paid by them, towards the expence of lighting such city, town corporate, or market-town, and shall pay the same yearly to such overseers as shall be appointed as aforesaid, who are hereby required to collect and receive the same. *f. 30.*

(2) And on refusal or neglect to pay, after reasonable demand, it shall be lawful for the said overseers, or any of them, to distrain every such occupier so refusing, and to raise, by sale of such distress, the sum which the owner thereof ought to have paid, as also one shilling for the costs attending such

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such distress and sale, and the surplus (if any) shall be returned to the owner, by the person so distraining. *Ibid.* § 2.

3. If any suit shall be brought against any person, for any distress so taken, he may plead the general issue, and give the special matter in evidence *f.* 33.

4. Provided, that for erecting, maintaining, lighting, and keeping the said lamps in repair for the first year, there shall not be collected above the sum of six-pence in the pound, of the yearly value of such houses so to be valued as aforesaid, nor in any one year after the said first year, more than three-pence in the pound of such yearly value. *f.* 34.

5. Provided, that after the first year after the said lamps are erected, the yearly charges of lighting, supplying, maintaining, and repairing each lamp, shall not be more than thirteen shillings for one whole year. *f.* 35.

6. All such inhabitants as aforesaid, shall have free access, at all convenient times, to the books of applotment of their respective cities, towns corporate, or market-towns, and shall be permitted, without fee, to take copies thereof. *f.* 36.

(2) And in case any person shall think themselves aggrieved by any applotment, it shall be lawful for them within the space of twenty days, after such applotment shall be entered by the said overseers, in books to be kept by them for that purpose, to appeal to such chief magistrate or justices respectively, who are hereby empowered to hear and determine the same, in the speediest manner, and their determination shall be final; and no fee shall be paid on making such appeal, or on the same being determined. *Ibid.* § 2.

IV. Penalty for breaking or extinguishing lamps.

1. By the act 33 G. 2. c. 18. If any person shall wilfully break, throw down, or extinguish any lamp that shall be set up to light the streets, courts, or lanes, in any such city, town corporate, or market-town, or wilfully damage the posts, irons, or other furniture thereof, every person so offending therein, and being thereof convicted by the oath, or (being of the people called *Quakers*) affirmation of one witness, before such chief magistrate, or one justice, within their respective jurisdictions, shall, for the first offence, forfeit twenty shillings for each lamp so broken, thrown down, extinguished, or otherwise damaged, and for the second offence, forty shillings, and for the third and every other offence, three pounds. *f.* 37.

2. And such justices are required, upon any informations exhibited, or complaint made in that behalf, within ten days after such offence committed, to summon the parties accused, and the witnesses on either side; and if the parties accused shall be lawfully convicted of such offence, by the oath of one witness, or on confession of the party charged with such offence, the said justices, shall give such judgment or determination, as is conformable to the true meaning hereof. *f.* 21.

(2) And it shall be lawful for such justices, to issue warrants for levying the penalties or forfeitures, so adjudged on the goods of the offender, and to cause sale to be made thereof, in case they shall not be redeemed in five days, rendering to the party the overplus (if any there be). *Ibid.* § 2.

(3) And

(3) And in case any person shall be convicted in the manner before prescribed, of breaking, throwing down, or extinguishing any lamp that shall be erected, and no goods of any person so offending, can at the time of such conviction be found, in such case it shall be lawful for the said justices before whom such persons shall be convicted, to commit such offender to the house of correction, there to be kept to hard labour, for any time not less than one month, and not exceeding three months, or until such penalty or forfeiture shall be paid. *Ibid.* § 3.

Larceny.

LARCENY comes from *latrocinium*, *latrociny*; and by contraction, or rather abuse, *larceny*. 3 Inst. 107.

I. Of grand larceny in general.

II. Of petit larceny.

III. Larceny from the person.

IV. Larceny from the house.

V. Larceny in a booth or tent.

VI. Stealing horses or cattle.

VII. Receiving stolen goods.

VIII. Receiving a reward for helping to stolen goods.

IX. Charges of prosecution and conviction how to be paid.

I. Of grand larceny in general.

Grand larceny is a felonious and fraudulent taking, and carrying away, by any person, of the mere personal goods of another, above the value of 12d. 1 Haw. 89.

Felonious and fraudulent] Felony is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion; as where persons break open a door, in order to execute a warrant, which will not justify such a proceeding; for in such case there is no felonious intention. 1 Haw. 65.

For it is the mind that makes the taking of another's goods to be felony, or a bare trespass only; but because the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; the same must be left to the due and attentive consideration of the judge and jury; wherein the best rule is, in doubtful matters rather to incline to acquittal than conviction. Only in general it may be observed, that the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it. 1 H. H. 509.

But nevertheless, doing it openly and avowedly doth not excuse from felony. So where a man came to *Smithfield* market to sell a horse, and a jockey

jockey coming thither to buy a horse, the owner delivered his horse to the jockey to ride up and down the market to try his paces, but instead of that, the jockey rode away with the horse; this was adjudged felony. *Kel.* 82.

So where a person came into a sempstress's shop, and cheapened goods, and ran away with the goods out of the shop, openly, in her sight, this was adjudged to be felony. *Raym.* 276.

So where a man comes into a house, by colour of a writ of execution, and carries away the goods; or sues out a replevin to get another man's horse, and then runs away with him; this is felony under colour of law. 2 *Ventr.* 94. *Kel.* 83.

Taking] All felony includes trespass; and every indictment must have the words *feloniously took*, as well as *carried away*: from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. 1 *Haw.* 89.

And from this ground it hath been holden, that one who finds the goods which I have lost, and converts them to his own use, with intent to steal them, is no felon; and *a fortiori* therefore it must follow, that one who has the actual possession of my goods by my delivery, for a special purpose, as a carrier who receives them, in order to carry them to a certain place; or a taylor who has them in order to make me a suit of cloaths; or a friend who is intrusted with them to keep for my use, cannot be said to steal them, by imbezilling of them afterwards. 1 *Haw.* 89.

But yet it hath been resolved, that if a carrier open a pack, and take out part of the goods; or a weaver who has received silk to work, or a miller who has corn to grind, take out part thereof, with intent to steal it, it is felony. 1 *Haw.* 90.

So where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them, with intent to steal them, it is felony; and the pretence of finding must not excuse. 1 *H. H.* 506.

So if a man's horse be going upon a common where he has a right to put him, and another take the horse with intent to steal him, it is no finding, but a felony. 1 *H. H.* 506.

So also, if the horse stray into a neighbour's ground or common, it is felony in him that so takes him. But if the owner of the ground takes him doing damage, or the lord seize him as a stray, though perchance he hath no title so to do, yet here is not a felonious intention, and therefore cannot be felony. 1 *H. H.* 506.

If one man's sheep stray into another man's flock, and that other person drives it along with his flock, or by bare mistake shears it, this taking is not a felony; but if he knew it to be another's, and marks it with his mark, this is an evidence of felony. 1 *H. H.* 507.

Lord *Hale* says, If one man take another man's hay or corn, and mingles it with his own heap or stock; or take another man's cloth, and embroider it with silk or gold; such other person may retake the whole heap of corn, or cock of hay, or garment and embroidery also; and this retaking is no felony, nor so much as a trespass. 1 *H. H.* 513.

It seems generally agreed, that one who has the bare charge, or the special use of goods, but not the possession of them; as a shepherd who looks after my sheep, or a butler who takes care of my plate, or a servant who keeps a key to my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking away the same. 1 *Haw.* 90.

By the 33 *H.* 8. §. 1. c. 5. Servants imbezilling their master's goods, to the value of 40s. or above (although this taking be no trespass) shall be punished as felons. But this shall not extend to any apprentice, nor to any person within 18 years of age.

Also by 9 *W.* c. 22. If any person shall take away, with intent to steal, or imbezil, any furniture out of his lodging, he shall be guilty of felony.

And carrying away] To make it come within this description, it seemeth that any the least removing of the thing taken, from the place where it was before, is sufficient for this purpose, though it be not quite carried off: And upon this ground, the guest, who having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny: So also was he, who having taken an horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. 1 *Haw.* 93.

By any person] A wife may be guilty thereof, by stealing the goods of a stranger; but not by stealing the goods of her husband. 1 *Haw.* 93.

It is said by Mr. *Dalton* and others, that it is no felony for one reduced to extreme necessity, to take so much of another's victuals, as will save him from starving; but lord *Hale* says, that this rule by the law of *England* is false; and therefore that if a person, being under necessity for want of victuals or cloaths, steals another man's goods, it is felony. 1 *H. H.* 54.

If one stealeth another man's goods, and afterwards another stealeth the same from him; the owner may charge the first or second felon at his choice. *Dalt.* c. 162.

An alien, whose sovereign is in amity with the crown of *England*, residing here, and receiving the protection of the law, oweth a local allegiance to the crown during the time of his residence. And if, during that time, he committeth an offence, he shall be liable to be punished for the same, even as a natural born subject. For his person and personal estate are as much under the protection of the law, as the natural born subject's; and if he is injured in either, he hath the same remedy at law for such injury. *Fost.* 185.

So also, an alien whose sovereign is at enmity with us, living here under the king's protection, committing offences, may be proceeded against in like manner; for he oweth a temporary local allegiance, founded on that share of protection he receiveth. *id.*

So also a prisoner of war, altho' he is not properly subject to the municipal laws of this realm, yet if he commits any offence against the law of nations, or the light of nature and the fundamental laws of all society, he is liable to answer in the ordinary course of justice, as other persons offending in like manner are. As in the case of *Peter Molieres*, a French prisoner,

who was indicted at the gaol delivery for the city of *Bristol* in *August* 1758, before Sir *Michael Foster*, for privately stealing in the shop of a goldsmith and jeweller, a diamond ring valued at 20*l*. Sir *Michael* says, he thought it highly improper to proceed capitally upon a local statute, against a prisoner of war; and therefore advised the jury to acquit him of the circumstance of stealing in the shop as by the statute, and to find him guilty of simple larceny to the value laid in the indictment. Accordingly, he was burnt in the hand, and sent to the prison appointed for *French* prisoners. *id.* 188.

Of the mere personal goods] *Mere*; for if the personal goods favour any thing of the realty, it cannot be larceny. And therefore they ought to be no way annexed to the freehold; therefore it is no larceny, but a bare trespass, to steal corn or grass growing, or apples on a tree; but it is larceny to take them being severed from the freehold, as wood cut, grass in cocks, stones digged out of the quarry; and this, whether they are severed by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them. 1 *Haw.* 93. 1 *H. H.* 510.

But by the 5 *G.* 2. *c.* 10. Every person who shall steal, rip, cut, or break, with intent to steal, any lead, iron bar, iron gate, iron palisadoe, or iron rail, fixed to any building, or in any garden, orchard, court-yard, fence, or outlet belonging to any building; he, his aiders and abettors, and also all who shall knowingly buy or receive the same, shall be guilty of felony, and be transported for seven years.

Also the goods ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen; as paper, or parchment, on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt, or other *chose* in action. 1 *Haw.* 93.

But by the *En. st.* 8 *H.* 6. *c.* 12. If any person shall steal any record or process belonging to any of the courts at *Westminster*, by reason whereof any judgment shall be reversed, he shall be guilty of felony.

And by the 3 *G.* 2. *c.* 4. *f.* 3. If any person shall steal or take by robbery any exchequer acquittance, debenture, bills of exchange, goldsmiths or bankers notes for payment of money, bonds, warrants, bills, or promissory notes for the payment of money, being the property of any other person, or of any corporation, notwithstanding any of the said particulars are termed in law a *chose* in action, it shall be deemed felony of the same nature, and with or without the benefit of clergy, or of the statute, in the same manner as it would have been if the offender had stolen or taken by robbery, any other goods of like value with the money due on such exchequer acquittance, debenture, bills of exchange, goldsmiths or bankers notes, bonds, warrants, or notes, or secured thereby and remaining unsatisfied, and shall suffer such punishment as if he or she had stolen other goods of the like value. But not to work corruption of blood.

The goods ought also not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like; which, howsoever they may be valued by the owner, shall never be so highly regarded by the law, that for their sakes a man shall die: But yet the stealing of an hawk, knowing

knowing it to be reclaimed, is felony by the common law and by statute, in respect of that very high value which was formerly set upon that bird. 1 Haw. 93.

Of another] It seems agreed, that the taking of goods, whereof no one had a property at the time, cannot be felony; and therefore that he who takes any treasure trove, or a wreck, waif, or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony, but shall be punished by fine. 1 Haw. 94.

But yet the taking of these must be, where the party that takes them, really believes them to be such, and colours not a felonious taking under such a pretence; for then every felon would cover his felony under that pretence. 1 H. H. 506.

Neither shall he who takes fish in a river or other great water, wherein they are at their natural liberty, be guilty of felony; as he may be, who takes them out of a trunk or pond. 1 Haw. 94.

Upon the like ground it seems clear, that a man cannot commit felony, by taking hares or conies in a warren, or old pigeons being out of the house; but it is agreed, that one may commit larceny, in taking such or any other creatures *feræ naturæ*, if they be fit for food, and reduced to tameness, and known by him to be so. 1 Haw. 94.

Also it is said, that there may be felony in taking goods, the owner whereof is unknown; in which case, the king shall have the goods, and the offender shall be indicted for taking the goods of a person unknown; and it seems, that in some cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape. 1 Haw. 94.

He who steals goods belonging to a parish church, may be indicted for stealing the goods of the parishioners. 1 Haw. 94.

And it hath been adjudged, that he who takes off a shroud from a dead corps, may be indicted as having stolen it from him, who was the owner thereof when it was put on; for a dead man can have no property. 1 Haw. 94.

Above the value of 12 d.] The learned editor of *Hale's* history of the pleas of the crown observes, that in former times, though the punishment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9 H. 1. it was enacted, that whoever was convicted of theft should be hanged, and the liberty of redemption was entirely taken away; which law continues to this day. But considering the alteration in the value of money, the severity of it is much greater now than it was then; for 12 d. would then purchase as much as 40 s. will now: and yet a theft above the value of 12 d. is still liable to the same punishment. Upon which Sir *H. Spelman* justly observes, that while all things else have risen in their value, and grown dearer, the life of man is become much cheaper; and from hence takes occasion to wish, that the ancient tenderness of life were again restored. 1 H. H. 12.

And lord *Coke*, observing that when the statute of the 3 Ed. 1. was made, which makes stealing of goods above the value of 12 d. to be grand larceny, the ounce of silver was at the value of 20 d. and now it is at the value of 5 s. and above, draws this conclusion, that the thing stolen ought to be reason-ably

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ably valued, that is, having respect to the great alteration in the value of money. 2 *Inst.* 189, 190. For 20 s. were then a real *pound* weight; which name we still retain, although the weight is much diminished.

If two persons or more, together, steal goods above the value of 12 d. every one of them is guilty of grand larceny; for each person is as much an offender as if he had been alone. 1 *Haw.* 95.

Also it seems the current opinion of all the old books, that if one at several times steal several parcels of goods, each under the value of 12 d. but amounting in the whole to more, from the same person, and be found guilty thereof on the same indictment, he shall have judgment of death as for grand larceny; but this severity is seldom practised. 1 *Haw.* 95.

II. Of petit larceny.

Petit larceny agrees with grand larceny in the several particulars above-mentioned, except only the value of the goods (and except as hereafter followeth); so that wherever an offence would amount to grand larceny, if the thing stolen were above the value of 12 d. it is petit larceny, if it be but of that value or under. 1 *Haw.* 95.

And if one be indicted for stealing goods to the value of 10 s. and the jury find specially, as they may, that he is guilty, but that the goods are worth but 10 d. he shall not have judgment of death, but only as for petit larceny. 1 *Haw.* 95.

In petit larceny there can be no accessaries, neither before nor after. 1 *H.* 530.

By the 3 *Ed.* 1. c. 15. Persons indicted of petit larceny, if they were not guilty of some other larceny aforetime, are bailable by justices of the peace. And it seems to be agreed, that there is no necessity, that such person be of good reputation: but yet if the crime be open and manifest, it seems that they ought not to be bailed; but if there be any colour of probability for their innocence, it seems most agreeable to the intention of the statute to bail them. 2 *Haw.* 101.

For a justice of the peace, before whom an offender shall be brought for petit larceny out of sessions, may not punish the said offender by his discretion, and so let him go; but must have him committed or bailed, to the intent he may come to his trial, as in cases of other felonies: And if upon his trial, the jury shall find the goods stolen to exceed 12 d. in value, the offender shall have judgment to die for the fault. *Dalt.* c. 154.

It seemeth that all petit larceny is felony, and consequently requires the word *feloniously* in an indictment for it; yet it is certain, that it is not punishable with the loss of life, or lands, but only with the forfeiture of goods, and whipping, transportation, or other corporal punishment. 1 *Haw.* 95.

If a man appear to be obstinately mute, on an arraignment of petit larceny, he shall not have judgment of *pain fort & dure*, as in cases of grand larceny, but he shall have the like judgment as if he had confessed the indictment. 2 *Haw.* 329.

III. Larceny

III. *Larceny from the person.*

If the goods are taken from a man's person, the offence receives a farther degree of guilt; and if it is attended with putting him in fear, it is called robbery; for which see that title.

If it is without putting him in fear, then it is called barely *larceny from the person*. 1 Haw. 95.

If it is done privily without his knowledge, by picking of pockets, or otherwise, it is excluded from the benefit of clergy by the 9 An. c. 6. (that is, if the thing stolen be above the value of 12 d. 2 H. H. 366.) But this statute extendeth not to accessaries, either before or after. 2 Haw. 350.

IV. *Larceny from the house.*

This must be understood where the offence falls short of *burglary*.

1. By the 9 W. c. 32. Every person that shall feloniously take away any goods, being in any dwelling house, any person being therein, and put in fear; or shall rob any dwelling house in the day time, any person being therein; he, his comforters and abettors, shall be guilty of felony without benefit of clergy. Robbing a dwelling house, some person being therein.

2. And by the same act; every person, who shall be convicted of the feloniously taking away in the day time any money or goods of the value of 5s. in any dwelling house, or outhouse thereunto belonging, and used to and with the same, altho' no person be therein, shall be guilty of felony without benefit of clergy. Robbing an house to the value of 5 s. no person being therein.

This requires an actual breaking, and not entering by the doors being open. 1 H. H. 548.

And this altho' nothing be actually taken: But it requires not only an actual breaking, and putting in fear, but also an entry *with intent to commit* felony, and so to be laid in the indictment. 1 H. H. 548.

All persons that shall by night or in the day time privately steal any goods to the value of five shillings, out of any shop, tan-yard, or drying-house belonging to a tanner, warehouse, cellar, coach-house, stable, or other out-house, though not adjoining to the dwelling house of the owner, although such shop, warehouse, tan-yard, drying-house, cellar, coach-house, stable or out-house, be not actually broke open by such offenders, and although the owners of such goods, or any other person, be or be not in such shop, warehouse, tan-yard, drying-house, cellar, coach-house, stable, or other out-house, to be put in fear, or shall steal any goods to the value of five shillings, left on any quay or in any wharf, or shall assist, hire, or command any person to commit such offences, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or will not directly answer to the indictment, or shall peremptorily challenge above twenty persons returned to be of the jury, shall be excluded from the benefit of the clergy or of any statute:

Warehouse]

Warehouse] In the case of *John Howard*, at the *Old Bayly*, July 3. 1751. He was indicted on this statute, for privately stealing goods, the property of *Messieurs Fludyer* and company, in the warehouse of *John Day*: There was another count in the indictment, charging that the prisoner stole the goods of *John Day* in his warehouse. The case upon evidence appeared to be, that *John Day* kept a common warehouse by the water side, where merchants did usually lodge goods intended for exportation, till they could have an opportunity of putting them on board. The goods in the indictment were sent by *Fludyer* and company to this warehouse, in order to be put on board a vessel for exportation, and were stolen by the prisoner in this warehouse. The court was of opinion, that this is not a case within the statute. For by the word *warehouse* in the statute is meant, not a mere repository for goods, but such places where merchants and other traders keep their goods for sale, in the nature of shops, and whither customers go to view them. And tho' the goods in this case might with propriety enough be charged to be the goods of *John Day*, since he had the charge and possession of them, which made him answerable to his principals for them; yet still the same objection recurreth, his warehouse was not a place for sale, but merely safe custody. Accordingly the larceny being fully proved, the prisoner was by the direction of the court found guilty of larceny, to the value laid in the indictment, and acquitted of stealing privately in the warehouse.—It hath been generally held, that the meaning of this act, with regard to *shoplifting*, is, that the goods must be such as are usually exposed to sale in the *shop*, and not any other valuable thing which may happen to be put there. And it seemeth that the same equitable construction should take place with regard to *warehouses*. The goods should be such as are usually exposed to sale in such places. And tho' *coachhouses* and *stables*, which are likewise named in the act, are not places for sale, yet still in the construction of so penal a law, it will not be amiss to carry the same equity as far as may be with regard to them. The goods should be such as are usually lodged in those places. *Fost. 77.*

Privately] If it shall appear on the evidence, as it often doth, that those places were *broke open* at the time of the larceny, the case (as it seemeth) will not come within the act. For the words are,—if any person shall *privately* steal,—which seemeth to exclude all cases, where any degree of force is used to come at the goods. *id. 79.*

Any goods, wares, or merchandizes] In which words *money* is not included. For altho' the word *goods* may in a large sense take in money, and often doth, yet being connected with *wares and merchandizes*, the safer construction of so penal a statute will be, to confine it to goods of like kind, goods exposed to sale. *id.*

And by the 3 *G. 3. c. 34.* No felon convicted according to the law and statutes of this kingdom of stealing of linen, hempen, or cotton yarn, or linen or hempen cloth, or cloth made of linen and cotton yarn, or any materials or utensils used in bleaching the same, above the value of five shillings, from any bleach-yard, buck-house, or work-house thereunto belonging,

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ing, whether the fact be committed by day or night, shall not be allowed the benefit of clergy. *f. 117.*

V. Larceny in a booth or tent.

Persons found guilty of robbing any person in any booth or tent, in any fair or market, the owner, his wife, children, or servants being within, shall suffer as felons without benefit of clergy. *11 J. 1. c. 3.*

VI. Stealing horses or cattle.

1. By the *11 Jac. 1. cap. 3. sect. 1.* If any person shall steal any horse, they shall suffer death without benefit of clergy.

2. And by the *9 An. c. 6.* If any person shall steal any cow, bull, ox, or any steer, heifer, calf, or any sheep or lambs, above the value of one shilling, and being indicted or appealed thereof, shall be found guilty by verdict, or shall confess the same on their arraignment, or will not answer directly according to law, or shall wilfully stand mute, or shall peremptorily challenge above twenty jurors, or shall be outlawed on the indictment, and all persons who shall be accessary before or after to any of the aforesaid respective facts, shall receive judgment, and suffer death without benefit of the clergy or of this act. *f. 3.*

3. Provided that where any persons shall be convicted of stealing of cows, bulls, oxen, steers or heifers, not exceeding the number of two, or of the stealing of calves, sheep or lambs, not exceeding the number of ten, on all the indictments that shall be preferred against such persons at one and the same assises, or sessions of *oyer and terminer*, or gaol delivery, or in the same term in *the Queen's-bench*, in case the justices before whom such persons shall be convicted, shall, upon the application of the grand-jury of the county at the said term, assises, or sessions, by presentment in writing, think them fit objects of mercy, they that shall be so convicted shall be burned in the hand only, and after such burning in the hand, such person shall be delivered out of prison, unless such justices shall for further correction think it convenient to detain them in prison for some longer time, which such justices by rule of court or warrant under their hands are impowered to do, not exceeding one year's imprisonment. *f. 4.*

VII. Receiving stolen goods.

1. By the *9 W. c. 32.* If any person shall buy or receive any stolen goods, knowing the same to be stolen; he shall be deemed an accessary after the fact, and suffer accordingly. *f. 4.*

2. And by the *8 An. c. 8.* If any person shall buy or receive any stolen goods, knowing them to be stolen, or shall receive, harbour, or conceal any felons or thieves, knowing them to be so; he shall be deemed accessary to the felony, and, being convicted on the testimony of one witness, shall suffer death as a felon convicted. *f. 5.*

P p p

3. And

3. And notwithstanding that regularly the accessary cannot be tried, till the principal be convicted, yet by the said statute it is enacted, that if the principal felon cannot be taken, so as to be prosecuted and convicted, yet nevertheless the buyer and reciver of stolen goods may be prosecuted as for a misdemeanor, and punished by fine and imprisonment, or other such corporal punishment as the court shall think fit; which shall exempt him from being punished as accessary, if the principal shall afterwards be taken and convicted. *s. 6.*

VIII. Receiving a reward for helping to stolen goods.

By the 6 G. 1. c. 12. Wherever any person taketh money or other reward, directly or indirectly, under pretence, or upon account of helping any person to any stolen goods; he shall (unless he apprehended the felon, or cause him to be apprehended, and cause him to be brought to his trial, and give evidence against him) be guilty of felony in the same manner as if he had stolen the same. *s. 5.*

And by the 8 G. 1. c. 9. Whosoever shall prosecute to conviction any person for the offence of taking money or other reward directly or indirectly to help any persons to their stolen goods, such offender, not having apprehended the felon who stole the same, and brought him or her to trial for the same, and given evidence against him or her as required by law, shall be intitled to a reward of five pounds for every such offender so convicted, which sum shall be raised and levied in like manner as the reward which persons may be intitled to for the apprehending any murderer or robber. *s. 4.*

IX. Charges of prosecution and conviction how to be paid.

By the 17 G. 2. c. 5. There shall be paid to every constable, who by virtue of a *writimus* under the hand and seal of any justice of the peace for treason or felony, shall carry to and safely lodge in the county-gaol, any person committed to him by such justice, the sum of three pence for each mile such person so committed shall be carried. *s. 4.*

And also the like sum shall be paid to each of two *protestants* armed with fire-arms, who shall go along with such constable to the county-gaol to guard such prisoners.

And in case there shall be more prisoners than one to be conveyed to gaol, the said justice shall appoint as many *protestants* with fire-arms to guard such prisoners, as shall be necessary for their safe conveyance to gaol, each of whom shall be intitled to the like sums of three pence a mile.

Which sums shall be raised by the grand juries of the respective counties.

And by the 3 G. 3. c. 28. It is enacted, that *whereas many persons accused of and guilty of treason and felony escape the punishment due to such crimes, by the poverty of their prosecutors, who actually forfeit their recognizances rather than undergo the loss of their labour, and the unavoidable expence they must be at by attendance at the assizes: if the judges of assizes and general gaol delivery, in any of the counties in this kingdom, shall recommend such*

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such persons so attending to prosecute as proper objects, to have an allowance for their time and avocation from their labour, it shall be lawful for the grand juries of the respective counties to present any sum, not exceeding two shillings *per* day, for such persons as shall be so detained from their labour and business, and necessarily attending to prosecute.

Warrant for larceny.

Dublin. } To the constable of ———

FOrasmuch as A. I. of ——— in the county of ——— yeoman, hath this day made information and complaint upon oath, before me ——— one of his majesty's justices of the peace for the said county, that this present day divers goods of him the said A. I. to wit, ——— have feloniously been stolen, taken, and carried away from the house of him the said A. I. at ——— aforesaid in the county aforesaid, and that he hath just cause to suspect, and doth suspect that A. O. late of ——— yeoman, feloniously did steal, take, and carry away the same: These are therefore to command you forthwith to apprehend him the said A. O. and to bring him before me to answer unto the said information and complaint, and to be further dealt withal according to law: Herein fail you not. Given under my hand and seal the ——— day of ——— in the year ———.

Note; The form of a warrant to search for stolen goods is inserted under the title *Search Warrant*.

Indictment for grand or petit larceny in general.

Dublin. **T**HE jurors for our lord the king upon their oath present, That A. O. late of ——— in the county of ——— labourer, on the ——— day of ——— in the ——— year of the reign of ——— with force and arms, at ——— in the county aforesaid, one linen sheet of the value of ——— of the goods and chattels of one A. I. then and there being, feloniously did steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Indictment for picking of pockets, or otherwise privately stealing from the person.

Dublin. **T**HE jurors for our lord the king upon their oath present, That A. O. late of ——— in the parish of ——— yeoman, on the ——— day of ——— in the ——— year of the reign of ——— with force and arms, at the parish aforesaid in the county aforesaid, one silver watch of the value of ——— of the goods and chattels of one A. I. from the person of the said A. I. subtilly, privily, craftily, and without the knowledge of the
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said

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said A. I. then and there feloniously did steal, take and carry away : against the peace of our said lord the king, his crown and dignity.

Indictment for breaking a house in the day time, some person being therein.

Dublin. **T**HE jurors for our lord the king upon their oath present, That A. O. late of — in the county of — labourer, on the — day of — in the — year of the reign of — at the hour of — in the afternoon of the same day, with force and arms, at — in the county of — the dwelling house of one A. I. there situate, (one B. I. wife of the said A. I. in the same house in the peace of God and of our said lord the king then being) feloniously did break and enter, and one silver spoon of the value of — of the goods and chattels of him the said A. I. then and there feloniously did steal, take, and carry away, and her the said B. I. then and there in bodily fear and danger of her life feloniously did put ; against the peace of our said lord the king, his crown and dignity.

Indictment for breaking a house in the day time (no person being therein.)

Dublin. **T**HE jurors for our lord the king upon their oath present, That A. O. late of — on the — day of — in the — year of the reign of — at the hour of — in the afternoon of the same day, with force and arms, at — in the county aforesaid, the dwelling house of one A. I. there situate, feloniously did break and enter, and one silver spoon of the value of — of the goods and chattels of him the said A. I. then and there feloniously did steal, take, and carry away ; against the peace of our said lord the king, his crown and dignity.

Indictment for stealing goods out of a shop, ware-house, coach-house, or stable.

Dublin. **T**HE jurors for our lord the king upon their oath present, That A. O. late of — in the county aforesaid, labourer, on the — day of — in the — year of the reign of — with force and arms, at — in the county aforesaid, one piece of cloth of the value of — of the goods and chattels of one A. I. in the shop of him the said A. I. then and there being found, then and there privately and feloniously did steal, take, and carry away ; against the peace of our said lord the king, his crown and dignity.

- I. *Of hides before they come to the tanner.*
- II. *Of the tanning of hides.*
- III. *Of the currying of hides.*
- IV. *Of the selling of leather, or exporting it.*

I. Of hides before they come to the tanner.

BY the 8 G. 1. c. 7. Every person salting hides for sale shall lay the same flesh to flesh, under penalty of forfeiting ten shillings for each hide that shall be otherwise laid, by the persons in whose custody the same shall be found to be otherwise laid, to be recovered and applied as herein after is mentioned. *f. 15.*

2. In case any hides or calf-skins shall be impaired by gashing, flawtering or cutting the same, not only the persons so offending, but likewise the persons who shall expose to sale such hides or calf-skins, shall forfeit for each hide so impaired, a sum not exceeding ten shillings, and for each calf-skin, a sum not exceeding two shillings and six pence, which forfeitures shall be recovered and applied as is herein after mentioned. *f. 17.*

3. It shall be lawful to seize and detain all persons and their goods which shall be made up, packed or bought and sold contrary to this act, for such reasonable time as they may give notice to the constables of the parish where such persons or their goods shall be so seized, who are required to carry such persons and their goods before the chief magistrate of the city or town corporate, or before some justice of the peace where such offence shall be committed if in no city or town corporate. *f. 20.*

(2) Which said magistrates or justices are required either upon the confession of the party offending, or due proof by one witness upon oath, that the person so brought before them hath offended contrary to this act, by warrant under their hands and seals, to cause such penalties as the offenders are hereby liable to, to be forthwith levied by distress and sale of the offenders goods, rendering the overplus, if any be, to the owners thereof after deduction of the reasonable charges for taking the said distress, and out of the said distress to pay the said respective penalties and forfeitures to the informer. *Ibid. § 2.*

(3) And in case such offenders shall not have goods sufficient to answer the said penalties, such offenders by warrant under the hand and seal of such magistrate or justice of the peace, shall be publickly whipt three market days successively through some market town in the county, in or near such place where the offence was committed, between the hours of eleven and twelve in the forenoon. *Ibid. § 3.*

4. And whenever any salt hides are seized or brought for trial before the magistrate or justice of the peace or seneschal, or are adjudged and condemned by them, or whenever any distress is or shall be taken pursuant to this or former acts of Parliament, no replevin shall lie, but the judgment of the magistrate or justice shall be conclusive. 12 G. 1. c. 5. *f. 11.*

II. Of

II. *Of the tanning of hides.*

1. By the 3 G. 3. c. 33. Every tanner or other person employed in the tanning of hides, shall flesh the hide of every cow, ox, and bull, intended to be tanned by him, in a clean merchantable manner, and shall also cut out the ears by the roots, and shall cut off the brich piece, the nose and lips, and the dew claws before he shall put such hide into the tann-pit, and every person offending in any of the above particulars, shall forfeit for every hide which shall not be so trimmed, two shillings and sixpence, *s. 1.*

2. No tanner or other person shall expose to sale any tanned hide, unless the first letter of the christian name and fir-name at length, and the town in or near which he lives, in large and legible characters, of the tanner of such hide, shall be stamped on the collet of such hide, and if the same be the hide of a bull, unless the word (bull) be stamped on the collet of the same; and every person offending in any of the said last mentioned particulars, shall for every tanned hide so exposed to sale, without being stamped as aforesaid, forfeit two shillings and sixpence, to be recovered in the manner herein after mentioned. *s. 2.*

3. No tanner or other person shall expose to sale any tanned hide which shall not be well and sufficiently tanned and dried, *s. 4.*

4. And in case any hides shall be condemned as not sufficiently tanned or dried, every tanner or other person who shall have offered such hides to sale, shall for every such hide so offered to sale, forfeit two shillings and six pence, *s. 6.*

(2) And in case any merchant or other person shall by collusion with any tanner or otherwise, buy any hides for exportation which shall not be merchantably tanned and dried, such merchant shall for every such offence forfeit two shillings and six pence for each unmerchantable hide as aforesaid, to be recovered as herein after mentioned. *Ibid. § 2.*

5. The said several penalties shall be recovered upon conviction by the confession of the party, or by the oath of one credible witness, before one justice of the peace of the place where the offence shall be committed, and shall be levied by way of distress upon the goods of the offender, by warrant under the hand and seal of the justice before whom such conviction shall be, returning the overplus; the said forfeitures to go to the informers. *s. 13.*

III. *Of the currying of hides.*

1. *For preventing of frauds in the manufacturing of curried leather,* every currier or person employed in currying calves skins or kips, shall curry the same with good oyl and dubbin, or tallow mixed with dubbin, and not with bark, grease, kitchen-stuff, or tar, and every person who shall curry any calve skin or kip otherwise, shall forfeit for every calve skin or kip which shall not be so curried six pence. 3 G. 3. c. 33. *s. 10.*

2. All merchants skins shall be taken down even in the heads and necks, and the flesh shall be taken clean off the bodies and shanks of such skins, except only such leather as shall be dressed for coach-makers, harness-makers, or
factors

adlers, and all rounded skins shall be cut off at the eye-holes, and the shanks cut off at the knees, and every person who shall not manufacture and trim such skins in the manner herein directed, (except as herein before excepted) shall forfeit for every calve skin or kip which shall not be so manufactured, and for every rounded skin which shall not be so trimmed six pence. *f. 11.*

3. The said several penalties shall be recovered upon conviction by the confession of the party, or by the oath of one credible witness, before one justice of the peace of the place where the offence shall be committed, and shall be levied by way of distress upon the goods of the offender, by warrant under the hand and seal of the justice before whom such conviction shall be, returning the overplus; the said forfeitures to go to the informers. *f. 13.*

IV. Of the selling of leather, or exporting it.

1. By the act 3 G. 3. c. 33. No person shall expose to sale any tanned hide which shall not be well and sufficiently tanned and dried, and in case any difference shall arise between the buyer or seller concerning the tannage or dryness of any such hide, the same shall be determined by two skilful persons, one to be chosen by each of the parties. *f. 4.*

And in case they shall not agree, then the persons who shall think themselves aggrieved, shall apply to the lord mayor of the city of *Dublin*, or to the chief magistrate of every other place where such difference shall happen, which said lord mayor or chief magistrate shall immediately summon the said parties as well as the said referees before him. *Ibid. § 2.*

And the said lord mayor or chief magistrate shall there name one protestant tanner, such as he shall think fit, as a referee, along with the said two persons who shall be chosen by the buyer and seller as aforesaid, and shall swear the said three referees to do equal justice between the parties, and the determination of such three referees, or of any two of them, shall be final and conclusive to all parties. *Ibid. § 3.*

2. In case the said persons so chosen as referees by the buyer or seller, shall neglect or refuse to obey the aforesaid summons, or that they or the said referees, who shall as aforesaid be named by the said lord mayor or chief magistrate, shall neglect or refuse to determine such difference within twenty four hours after they shall be sworn as aforesaid, then each and every of such persons so offending, shall forfeit twenty shillings *Sterl.* to be levied by warrant, under the hand and seal of the said lord mayor or such chief magistrate, of the goods of such offender, and to be by such lord mayor or chief magistrate, paid over to the church-wardens of the parish where such difference first arose, to be distributed among the poor of the said parish, and the said lord mayor or chief magistrate, shall then name two or three persons, such as he shall think fit, and swear them to determine the disputes aforesaid. *f. 5.*

3. And in case any hides shall be condemned in the manner herein before-mentioned, as not sufficiently tanned or dried, every tanner or other person who shall have offered such hides to sale, shall for every such hide so offered to sale, forfeit two shillings and six pence, to be recovered as herein after

Leather.

ter mentioned; and in case any merchant or other person shall by collusion with any tanner or otherwise, buy any hides for exportation which shall not be merchantably tanned and dried, such merchant shall for every such offence forfeit two shillings and six pence for each unmerchantable hide. *f. 6.*

4. Every merchant or other person who shall attempt to export any hides not marked or stamped as herein before is directed, or who shall neglect to enter the hides so brought in the craner's book in their own names at length, shall for every such hide so attempted to be exported, or which shall not be so entered as aforesaid, forfeit two shillings and six pence. *f. 7.*

5. Every merchant who shall buy hides at the said publick crane, shall remove the same from such crane in forty eight hours after the same shall be sold to him, if the weather will permit the same, under the penalty of paying a penny for each hide by the day, for every day he shall suffer them to remain in the said crane, after the expiration of forty eight hours. *f. 8.*

6. No craner or other person employed by him, shall buy or sell any tanned or curried leather which shall be brought for sale to the said crane, under the penalty of forty shillings for every time they shall so buy or sell, and such craner shall keep a publick book in such crane, wherein shall be entered in fair and legible characters, all tanned and curried leather brought to such crane, with the names of such persons to whom they belong, and the names of the persons who should buy the same, under a penalty of five shillings for every neglect or omission in this particular. *f. 9.*

Lecturer.

BY the 17 & 18 C. 2. c. 6. Lecturers in churches, unlicensed, or not conforming to the liturgy, shall be disabled, and shall also suffer three months imprisonment in the common gaol; and two justices (or the mayor in a town corporate) shall, upon certificate from the ordinary, commit them accordingly. *f. 19.—23.*

Leet.

Meaning of
the word.

1. **L** EET (*leth, lathe, lathe*) is of *Saxon* original, and seemeth to be no other than the court of the *lathe*; as the county court is the court of the county. For in ancient times the counties were subdivided into lathes, rapes, wapentakes, hundreds, and the like. And the sheriff twice a year performed his *tourn* or perambulation, for the execution of justice throughout the county. Afterwards this power of holding courts was granted to divers great men, within certain districts. And from hence, these courts, holden within particular parts of the county, have descended unto us without variation, under the name of the *leet, leth, or lathe* courts.

Leet, what.

2. The *court leet* is a court of record, having the same jurisdiction within some particular precinct, which the sheriff's *torn* hath in the county. 2 *Haw. 72.*

3. For

3. For the leet, or view of frankpledge, was by the king (for ease of the people) divided, and derived from the torn; who did grant to the lords to have the view of the tenants and resiants within their mannors; so as the tenants and resiants should have the same justice that they had before in the torn, done unto them at their own doors, without any charge or loss of time. *2 Inst. 71.*

Leet derived from the torn.

4. The institution hereof for keeping of the king's peace, was, that every freeman at his age of 12 years (except peers, clergymen, and tenants in ancient demesne, *2 Haw. 57.*) should in the leet, if he were in any leet, or in the torn if he were not in any leet, take the oath of allegiance to the king; and that pledges or sureties should be found for his truth to the king, and to all his people, or else to be kept in prison: This frankpledge consisted most commonly of ten households, which the Saxons called *theotbung*, in the north parts they call them *tenmentale*, in other places of England *titbing*; whereof the masters of the nine families who were bound, were of the Saxons, called *freoborh*, which in some places is to this day called *freeborow*, that is, free surety, or frankpledge, and the master of the tenth household was called *theotbungmon*, to this day in the west called *titbingman*, and *tibenbeofod*, and *freeborher*, that is, *capitalis plegius*, chief pledge; and these ten masters of families, were bound one for another's family, that each man of their several families should stand to the law, or if he were not forthcoming, that they should answer for the injury or offence by him committed. And the precinct of this frankpledge was called *decenna*, because it consisted most commonly of ten households; and every man of those several households, for whom the pledge or surety was taken, were called *decennarii*; which names are continued as shadows of antiquity to this day. *2 Inst. 73.*

Frankpledge.

And by the due execution of this law, such peace was universally holden within this realm, as no injuries, homicides, robberies, thefts, riots, tumults, or other offences were committed; so as a man with a white wand might safely have ridden before the conquest, with much money about him, without any weapon, throughout England. *2 Inst. 73.*

But no person is obliged to appear at any leet, within the precincts whereof he doth not reside. *2 Haw. 57.*

5. He that claims a leet by charter, must hold it on the days prescribed by the charter; he that claims it by prescription, may claim to hold it once or twice every year, at any such days as shall upon reasonable warning be appointed, if the usage hath been so that it hath been kept at uncertain times; or else it ought to be kept at such certain days and times, as by prescription hath been certainly used. *2 Inst. 72.*

Leet when to be holden.

6. If a nuisance done within the jurisdiction of the leet, be not presented in the leet, the sheriff in his torn cannot inquire of it; for that which is within the precinct of the leet is exempt from the torn, otherwise there might be a double charge; but in that case a writ may be directed to the sheriff to enquire thereof. *4 Inst. 261.*

Offences within the leet, not inquirable in the torn.

7. It seems that a court leet is so far intrusted with the keeping of the peace within its own precinct, that the steward of it may by recognizance bind any person to the peace, who shall make an affray in his presence, sitting the court, or may commit him to ward, either for want of sureties, or by way of punishment, without demanding any sureties of him, in which case he may afterwards impose a fine according to his discretion. *2 Haw. 4.*

Steward may commit for an affray.

What felonies
are cognizable
in the leet.

8. The leet hath power to receive indictments of felonies at the common law, but not of felonies by act of parliament, unless specially limited there-
to. *2 H. H. 71.*

Other publick
offences.

9. Furthermore, this court hath cognizance of a great number of offences, both by the common law, and by statute; as for instance, tipling in ale-houses; assaults whereby bloodshed ensueth; common barators; bawdy houses; defects in bridges and highways; destroyers of ancient boundaries; bakers; brewers; butchers; curriers; cottagers and inmates; deciners or suitors not appearing in the leet; estrays, waifs, and treasure trove; eaves droppers; forestallers, regrators, ingrossers; destroyers of game; gamesters; hedge breakers; neglecters of hue and cry; higlers; innholders; millers; night walkers; common nuisances; want of pillory and stocks, and common pounds; rescous; scolds; shoemakers; searchers of leather; stoned horses of two years old put on the common; victuallers; constables neglecting watch and ward; weights and measures; and many others by particular statutes. *Wood b. 4. c. 1.*

Private offen-
ces.

10. But a man cannot be presented in the leet for furcharging the common, or for digging in the common; because this concerns the private, not the publick interest, and belongs rather to the court baron to inquire of it. *Wood b. 4. c. 1.*

Within what
time offences
are cognizable.

11. Also no offence is cognizable in the leet, unless it arose since the holding of the last court. *2 Haw. 66.*

Constables
chosen in the
leet.

12. The constables of common right are to be chosen and sworn in the leet or torn. *2 Haw. 62.*

Jurors.

13. The leet seems not to be within the equity of the statute of *1 R. 3.* which requires that the jurors in the torn shall have *20 s.* a year freehold, or *26 s. 8 d.* copyhold or customary; for it is said, that any person happening to be present at the leet, or to be riding by the place where it is holden, may for the want of jurors be compelled by the steward to be sworn, whether he be resident within the leet or not; by which it seems to be implied, that any person whatsoever is capable of being put upon the jury in a court leet. *2 Haw. 69.*

Indictments to
be indented.

14. Indictments in the leet ought to be by roll indented, one to remain with the indictors, and the other with the steward, to prevent imbezilling. *2 Haw. 69.*

Indictments of
felonies, how
to be certified.

15. Although the leet may receive indictments of felony, yet it cannot hear and determine them, but must send them to the gaol delivery, there to be heard and determined, if the offenders are in custody; or remove them by certiorari into the king's bench, that process may be made upon them to outlawry. *2 H. H. 71.*

Traverse.

16. It seems to be agreed, that a presentment in the leet of any offence within the jurisdiction of the court, being neither capital, nor concerning any freehold, subjects the party to a *fine* or *amerciamment* without any farther proceeding, and admits of no traverse to the truth of it: But if it touch the party's freehold, it may be removed into the king's bench, and there traversed. *1 Haw. 217, 219. 2 Haw. 71.*

Fine.

17. A *fine* is a pecuniary punishment, assessed by the steward, for an offence or contempt committed in court, or by publick officers out of court, in administration of their offices; a fine is always assessed by the steward, and is not to be affected, though sometimes it is called an *amerciamment*; and the

the lord by a special warrant to the bailiff may distrain, or he may have an action of debt, for a fine imposed, but he cannot imprison; and this is the only court that can fine and not imprison. *Wood b. 4. c. 1. 2 Haw. 61.*

18. An *amerciament* is a pecuniary punishment, assessed by the homage or jury, for offences committed out of court by private persons, to be mitigated by affeerers (from *affeurer*, to tax), who are to affirm the reasonableness thereof upon their oaths, where no express penalty is inflicted by statute; and for this also the lord may have an action of debt, or may distrain of common right, and impound the distress, or sell it at his pleasure, but cannot imprison for it. *Wood b. 4. c. 1.*

Amerciament.

19. And upon presentment of a nuisance, the steward may either amerce the person, and order him also to remove it by such a day, under pain of forfeiting a certain sum; or he may order him to remove it, under such a pain, without amercing him at all: and on presentment at another court, that he hath not removed such nuisance (having had notice thereof) the pain may be recovered by distress or action of debt, without farther proceeding. *2 Haw. 61.*

Amerciament how recovered.

20. It seemeth that of common right any court leet, with the assent of the tenants, may make by-laws under certain penalties, in relation to matters properly within the cognizance of such court, as the reparation of the highways, and the like: And also a court baron by custom may make by-laws, for the well regulating of commons, and such like private matters. And therefore where a court leet and baron are holden together, as they usually are, it seems, that what is transacted therein, in relation to publick matters, shall be applied to the jurisdiction of the court leet, and what is done in relation to private matters, shall be intended to be done by the court baron. *2 Haw. 68.*

By laws.

21. The lord of the leet ought to have a pillory and tumbrel; and for want thereof, he may be fined, or his liberty seized. *Cro. El. 698.*

Pillory and stocks.

But the stocks are to be provided at the charge of the town; for originally they were not to punish, but to keep men in hold. *Wood b. 4. c. 1.*

22. But the business of the leet hath declined for many years; and is devolved on the quarter sessions.

Business devolved on the sessions.

Letter.

BY the act, 29 G. 2. c. 12. s. 2. If any person, shall knowingly write, or send, or cause, or procure to be written or sent, any letter without a name subscribed thereto, or signed with a fictitious name, or knowingly shall publish, or cause to be published, or shall set up, or cause to be set up in any place, any written or printed advertisement or paper, thereby threatening any violence, injury, or damage to the person, or to the estate or property of any landlord, agent, or receiver, or of any rector, vicar, lay-impropriator or tithe-farmer, or of any tenant or parishioner, or with an intention to terrify such landlord from setting any lands to the best advantage; or to terrify any landlord, agent or receiver, from distraining for any rent, or arrears of rent; or with an intention to terrify any person from assisting such landlord or receiver in distraining for such rent, or arrears of rent; or with an intention to terrify any rector, vicar, lay-impropriator, or tithe-farmer,

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mer,

Tetter.

mer, from taking any tithe in kind, or from setting or selling any tithe to the best advantage; or with an intention to terrify any persons from assisting such rector, vicar, lay-impropriator, or tithe-farmer, in drawing, setting, or selling any tithe; or with an intention to procure or encourage any unlawful combination of tenants to hinder or obstruct their landlord, or the agent of such landlord, in the setting any lands, &c. to the best advantage, or in distraining for any rent, or arrears of rent; or with an intention to procure or encourage any unlawful combination of parishioners, to hinder or obstruct any rector, vicar, lay-impropriator, or tithe-farmer, in drawing any tithes, or in setting or selling any tithes to the best advantage: every person so offending, being lawfully convicted, upon the oath of one credible witness, before any two justices of the peace for the county, city, town, or place where such offence shall be committed, upon any information or prosecution exhibited or commenced within three calendar months after the offence committed (which oaths the said justices are hereby impowered and required to administer,) shall forfeit five pounds, *scilicet* one half thereof to be given to the informer, and the other half to the poor of the parish in which such offence shall be committed; which said sum of five pounds, the said justices are required to levy by issuing their warrants under their hands and seals, for distress and sale of the offenders goods and chattles, returning the overplus to the owner; and for want of sufficient distress, such offender shall by the order of such justices, at their discretion, be committed either to the house of correction, there to remain and be kept at hard labour, or to the common goal of such county, &c. there to remain without bail or mainprize, for any time not exceeding three calendar months.

Lewdness.

1. **I**F any offend their brethren by adultery, whoredom, incest, or any other uncleanness, the churchwardens shall present them to the ordinary, and they shall not be admitted to the holy communion, till they be reformed. *Can. 61.*

2. But altho' lewdness be properly punishable by the ecclesiastical law, yet the offence of keeping a bawdy house cometh also under the cognizance of the law temporal, as a common nuisance, not only in respect of its endangering the publick peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes. *3 Inst. 205. 1 Haw. 196.*

3. And in general, all open lewdness grossly scandalous is punishable upon indictment at the common law. *1 Haw. 7.*

4. And offenders of this kind are punishable not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion shall seem proper. *1 Haw. 196.*

5. And upon information given to a constable, that a man and woman are in adultery or fornication together, or that a man and woman of evil report are gone to a suspected house together in the night, the officer may take company

company with him, and if he find them so, he may carry them before a justice, to find sureties of the good behaviour. *Dalt. c. 124. 2 Haw. 61.*

6. For it seems always to have been the better opinion, that a man may be bound to his good behaviour, for haunting bawdy houses with women of bad fame, as also for keeping bad women in his own house. *1 Haw. 132.*

7. And a wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy house; for this is an offence as to the government of the house; in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. *1 Haw. 2.*

8. And if a wife go away, and remain with an adulterer, without being reconciled to her husband, she shall lose her dower. *2 Inst. 435.*

9. But if a person is indicted for frequenting a bawdy house, it must appear that he knew it to be such a house; and it must be expressly alledged that it is a bawdy house, and not that it is suspected to be such a house. *Wood b. 3. r. 3.*

10. On an indictment for keeping a disorderly house, a female witness swore, that she was a sailor's wife, and during her husband's absence out of the realm, she had often prostituted herself there: Lord Raymond said, it was an odious piece of evidence, and ought not to be heard. *Barl. Bawdy-h.*

11. But it is said, a woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable. *1 Haw. 196. 1 Salk. 382.*

Indictment for keeping a disorderly house.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of _____ in the said county, labourer, on the _____ day of _____ in the _____ year of the reign of _____ and at divers other times as well before as after, with force and arms at _____ aforesaid, in the county aforesaid, did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly house, and in his said house, for his own lucre and gain, certain evil and ill-disposed persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together then, and the said divers other times, there unlawfully and wilfully did cause and procure; and the said men and women, in his said house, at unlawful times, as well in the night as in the day, then and the said other times, there to be and remain, drinking, tipling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the subjects of our said lord the king, and against the peace of our said lord the king, his crown and dignity.

Libel.

- I. *What it is.*
- II. *Who are punishable for it.*
- III. *How punishable.*

I. *What it is.*

A Libel is a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead. *Wood b. 3. c. 3.*

A malicious defamation.] And the scandal which is expressed in a scoffing and ironical manner, is as properly a malicious defamation, as that which is expressed in direct terms; as where a person proposes one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar; and the like: which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so. *1 Haw. 194.*

And from the same foundation it hath also been resolved, that a defamatory writing, expressing only one or two letters of a name, in such a manner, that from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if restrained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: And it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury. *1 Haw. 194.*

And it matters not whether the libel be true, or whether the party against whom it is made be of good or bad fame; for in a settled state of government, the party grieved ought to complain, for any injury done to him, in the ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise. *5 Co. 125.* But this is to be understood, when the prosecution is by information or indictment; but in an action on the case, one may justify that it is true. *Wood b. 3. c. 3.*

Of any person] Where a writing inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel; but it must descend to particulars and individuals to make it a libel. *3 Salk. 224.*

And it hath been agreed in the court of king's bench, that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law: yet it seems that the author may be bound to his good behaviour, as a scandalous person of evil fame. *1 Haw. 195.*

But

But if the libel is only against a private person, yet it deserveth severe punishment; for albeit the libel be against one, yet it inciteth all those of the same family, kindred, or society, to revenge, and so tendeth by consequence to quarrels, and breach of the peace, and may be the cause of effusion of blood, and of great inconvenience: But if it be against a magistrate, or other public person, it is a greater offence; for it concerneth not only the breach of the peace, but the scandal of the government. 5 Co. 125.

Expressed either in printing or writing, signs or pictures] A libel is either in writing, or without writing: In writing, when an epigram, rhyme, or other writing is published to the contumely of another, by which his fame or dignity may be prejudiced; Without writing, may be by pictures, as to paint the party in any shameful and ignominious manner; or by signs, as to fix a gallows, or other reproachful and ignominious signs at a man's door. 5 Co. 125.

E. 7 G. Mayor of Northampton's case. He sent lord *Halifax* a licence to keep a publick house, which the court said was a libel in the case of a person of his quality, and granted an information for it. *Str.* 422.

Or the memory of one that is dead] For the offence is the same, whether the person libelled be alive or dead. 5 Co. 125.

II. Who are punishable for it.

It is certain, that not only he who composes a libel, or procures another to compose it, but also he who publishes, or procures another to publish it, are in danger of being punished for it; and it is said not to be material, whether he who disperses a libel knew any thing of the contents or effect of it or not; for nothing would be more easy, than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them. 1 *Haw.* 195.

Also it hath been said, that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it, in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. 1 *Haw.* 195.

Also it hath been holden, that the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove, that he delivered it to a magistrate to examine it. 1 *Haw.* 195.

And it hath been ruled, that the finding a libel on a bookseller's shelf, is a publication of it by the bookseller; and that it is no excuse to say, that the servant took it into the shop without the master's knowledge; for the law presumes the master to be acquainted with what the servant does. *Sess. C. V. 1. p. 33. K. and Dodd, 10 G.*

And it seems to be the better opinion, that he who first writes a libel dictated by another, is thereby guilty of making it, and consequently punishable for the bare writing; for it was no libel, till it was reduced to writing: For the essence of a libel consisteth in the writing of it; for if a man speaks

speaks such words, unless the words be put in writing, it is not a libel. 2 Salk. 419. 1 Haw. 195.

Also it hath been resolved, that the sending of a letter full of provoking language to another, without publishing it, is highly punishable, as manifestly tending to a disturbance of the peace. 1 Haw. 195.

But it hath been resolved, that he who barely reads a libel in the presence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his custody, shall not in respect of any such act be adjudged the publisher of it. But the having in one's custody a written copy of a libel publickly known, is an evidence of the publication of it. 1 Haw. 196.

The way for a man to keep himself out of danger in such cases is, if he finds a libel, and it be composed against a private person, he either may burn it, or forthwith deliver it to a magistrate; but if it concern a magistrate, or other publick person, he ought immediately to deliver it to a magistrate, to the intent that by examination and enquiry, the author may be found and punished. 5 Co. 125.

III. How punishable.

There seemeth to be no doubt, but that the offenders may be condemned to pay such fine, and also to suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender. 1 Haw. 196.

And it hath been adjudged, that libels, as having a direct and immediate tendency to a breach of the peace, are indictable before justices of the peace. 2 Haw. 40.

On an indictment setting forth the offence, according to the tenor and to the effect following, it was agreed by the court, that to the effect following had been naught, being vague and useless words; for the court must judge of the words themselves: but the words, according to the tenor, do correct the defect; for they import the very words themselves, for the tenor of a thing is the transcript and true copy of it, to which it may be compared: and therefore of words spoken there can be no tenor, because there is no written original. 2 Salk. 417. 3 Salk. 225.

And it must be proved to be written or published, in the county laid in the indictment; all matters of crime being local. Read. Lib. State Tr. V. 3. 774, 775, V. 4. 672.

Indictment for a libel.

THE jurors for our lord the king upon their oath present, that A. O. late of _____ in the county of _____ gentleman, not having God before his eyes, but moved by the instigation of the devil, and falsely and maliciously contriving and intending to bring our said lord the king into hatred and infamy amongst his subjects, and to move sedition amongst the subjects of our said lord the king, did on the _____ day of _____ in the _____ year of the reign of _____ with force and arms, at _____ aforesaid, in the county aforesaid, falsely, seditiously, and maliciously write and publish, and cause to be written and published,

ed, a certain false, seditious, and scandalous libel, intituled—In which said libel are contained, among other things, divers false, seditious, scandalous, and malicious matters, according to the tenor following, to wit,—And in another part of the same libel are contained divers other false, seditious, scandalous, and malicious matters, according to the tenor following—to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

Linen Manufacture.

- I. Of penalties under this title.
- II. Of unlawful combinations.
- III. Of journey-men and apprentices.
- IV. Damaging materials or tools.

I. Of the penalties under this title.

1. **B**Y the act 3 G. 3. c. 34. s. 106. All offences committed against this act, except where the same are hereby particularly appointed to be heard and determined, and except where the penalty or forfeiture does or may exceed six pounds, may be heard and finally determined, by the said trustees or any one of them, or by any one justice of the peace, or chief magistrate of any city or town corporate within their respective jurisdictions.

2. It shall be lawful for the said several persons hereby impowered to hear and determine the said offences respectively, to examine upon oath all such witnesses as shall be produced before them respectively, which oath they are hereby impowered respectively to administer, upon any complaint or information to them made, of any offence committed against this act. s. 108.

And to issue their warrants respectively to any constables, requiring and empowering them by distress and sale of the offender's goods (the overplus whereof shall be rendered to the owners) to levy the respective penalties or forfeitures by such offenders incurred, which when levied shall be paid to the real informer or prosecutor in all cases, except where the same are hereby otherwise directed to be applied, first deducting thereout the sum of two shillings in the pound, to be paid to the constables for executing such warrant. *Ibid.*

3. In case no sufficient distress can be found, then it shall be lawful for the several persons hereby impowered to hear and determine the said offences respectively, by their respective warrants, to commit such offenders to the house of correction, or next gaol, for so long time as they shall respectively think proper, not exceeding six months in the whole. *Sett.*

4. Provided, that nothing herein contained shall extend to charge any persons with any penalty, forfeiture, or punishment, for any offence against this act, unless they so offending shall be complained of, or informed against, to the persons hereby impowered to determine such offences, within six months after such offence shall be committed. s. 112.

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5. If any complaint or information shall be made or given against any weaver, manufacturer, or seal-master, for any offence against this act, it shall be lawful for the persons herein before impowered to determine such offence, in case it shall appear to them that such complaint or information was ill founded, and without just cause, to adjudge the persons making or giving such complaint or information, to pay to the persons so complained of, or informed against, any sum not less than two shillings, nor exceeding ten shillings. *f. 113.*

6. It shall be lawful for the persons hereby impowered to hear and determine offences against this act, by writing under their hands, to summon and order the apprentice, servant, or journey-man, of any reed-maker, weaver, or manufacturer of linen or hempen cloth, bleacher, or draper, or flax-seed merchant, or any other persons to appear before them, and upon their appearance, to examine them upon oath as to their knowledge, concerning any offence against any part of this act. *f. 114.*

7. In case such apprentice, servant, journey-man, or other person, being summoned, shall wilfully refuse to appear pursuant to such summons, or appearing, shall refuse to be examined upon oath, to the purpose aforesaid, it shall and may be lawful for such persons impowered as aforesaid, to commit such apprentice, servant, journey-man, or other person to the house of correction, or next gaol, there to be kept for the space of thirty days, unless they shall sooner submit to be examined as aforesaid. *f. 115.*

8. Provided that such person as shall be so examined, shall not be liable to any penalty, forfeiture, or punishment, relating to the offence which he or she shall on such examination discover. *f. 116.*

9. If any persons shall rescue, or take by force, any hemp-seed, flax-seed, flax, hemp, twine, ropes, cordage, thread, bolls, tapes, chatts, inkles, filleting, brades, ferretting, shoe-lace, points, bobbin, linen-yarn, hempen-yarn, weaving-reed, linen-cloth, or hempen-cloth, out of the custody or possession of any persons, who shall have seized the same, for being managed, used, or made contrary to the directions aforesaid, every such person, so rescuing or taking by force, shall forfeit forty shillings, and also the full value of the goods so rescued and taken as aforesaid. *f. 118.*

II. Of unlawful combinations.

1. By the act 3 G. 3. c. 34. If any person shall summon, by writing or otherwise, any manufacturer, artificer, weaver, journey-man, apprentice, or labourer, usually employed in any branch of the linen, hempen, or cotton manufacture, or in any manufacture wherein any linen, hempen, or cotton yarn, or thread shall be mixed or wrought up, to appear at any meeting, in order to consult upon or to enter into any rule, agreement, or combination, to ascertain or fix the price of labour or workmanship. *f. 32.*

Or shall administer, or cause to be administered, any oath or declaration, to any such manufacturer, artificer, weaver, journey-man, apprentice, or labourer, tending to fix the price of wages of labour or workmanship.

Or shall issue or cause to be issued, deliver or cause to be delivered, any ticket, certificate, or token, other than and except such ticket or certificate as

as shall or may be delivered by, or by the order of the corporation, whereof such manufacturer, artificer, weaver, journey-man, apprentice, or labourer, is or shall be a member, to any such manufacturer, artificer, weaver, journey-man, apprentice, or labourer, of his being licensed to work at their respective trades.

Or shall make or join in making any rule, order, or regulation, relating to the prices or wages of labour or workmanship, in any part or branch of the linen, hempen, or cotton manufacture, or of any manufactures made up of cotton, hemp, or linen, or wherein any hemp, linen, or cotton, are or shall be mixed.

Or shall by force, menaces, or otherwise, hinder, or attempt to hinder, any such manufacturer, artificer, weaver, journey-man, apprentice, or labourer, to work at their respective trades, at such prices as they shall agree for with their respective employers.

Every such person being thereof lawfully convicted by the testimony, upon oath, of one credible witness, or by the confession of the person charged with such offence, before any one justice of the peace, or any chief magistrate, within their respective jurisdictions, which oath such justice or chief magistrate is hereby impowered and required to administer, it shall be lawful for such justice and chief magistrate, respectively, by warrant under his hand and seal, to commit the persons so convicted, to gaol, there to be kept without bail or mainprize, for six months; and also to order the persons, so convicted, to be three times publickly whipped, at some publick place within the jurisdiction of such justice of the peace, or chief magistrate.

2. If any such manufacturer, artificer, weaver, journey-man, apprentice, or labourer, as aforesaid, shall take an oath, or enter into any combination or agreement, to ascertain or fix the price of wages or workmanship, or take any oath, or enter into any combination, not to work for any particular masters, or employers, and shall be thereof convicted by the testimony, upon oath, of one credible witness, or by the confession of the person charged with such offence, before any one justice of the peace, or any chief magistrate, within their respective jurisdictions, which oath such justice or chief magistrate, is required to administer; it shall be lawful for such justice, or chief magistrate, by warrant under his hand and seal, to commit the persons so convicted, to gaol, there to be kept without bail or mainprize, for six months; and also to order the persons, so convicted, to be three times publickly whipped at some publick place within the jurisdiction of such justice or chief magistrate shall think proper. *f. 33.*

III. Of journey-men and apprentices.

1. 3 G. 3. c. 34. No person shall entertain any journey-man linen weaver, inhabiting in this kingdom, in any employment as a linen weaver, unless such journey-man linen weaver shall first produce to the person about to hire him, a certificate in writing, under the hand of the master he last served in this kingdom, of such journey-man's being discharged from such master's service, or of a justice of peace, or chief magistrate, as hereafter mentioned, upon pain of forfeiting five pounds. *f. 28.*

2. And if any master shall refuse, without just cause, to give such certificate, upon complaint made thereof by such journey-man to a justice of the

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peace of the county, or chief magistrate in any corporate town where such master inhabits, such justice of peace, or chief magistrate, shall send for such master, and upon his appearance shall require from him the reason why such journey-man is refused his discharge. *f. 29.*

3. In case such master shall wilfully decline to appear before such justice of the peace, or chief magistrate, or upon his appearance, such justice of the peace, or chief magistrate, shall find that the cause of refusal of such certificate is not sufficient, in either of the said cases, such justice of the peace or chief magistrate, is required to give to such journey-man, a certificate of such causeless refusal.

Which certificate by such justice of the peace, or chief magistrate, shall be as effectual as if a certificate had been given by such master, and shall be given without fee or reward, and shall fully discharge such journey-man to all intents and purposes.

4. If any person shall forge or counterfeit any such certificate, or shall produce any such certificate, knowing the same to be forged or counterfeited, such person, upon being indicted and convicted thereof, shall suffer one year's imprisonment, without bail or mainprize. *f. 30.*

5. No linen weaver, or linen manufacturer, shall employ his apprentice for any unreasonable time in husbandry, or any other work or labour not relating to the business or trade of a linen weaver, except only during twenty-four days in harvest in every year; upon pain of forfeiting for the first offence ten shillings, and for the second offence twenty shillings, and for the third offence, such apprentice shall, if he desires the same, be discharged from serving the remaining time of his apprenticeship; and also have what apprentice-fee was given with him to such linen weaver or manufacturer, returned to him. *f. 31.*

IV. Of damaging materials or tools.

By the 3 G. 3. c. 34. If any person shall by day or by night break into any house or shop, or enter by force into any house or shop with intent to cut or destroy any linen, hempen, or cotton yarn, or any linen, cotton or hempen cloth, or any manufacture made or mixed with linen, cotton, or hempen yarn, or any tools employed in making thereof. *f. 34.*

Or shall wilfully or maliciously cut or destroy any linen, or hempen, cotton, or woollen manufacture, or any manufacture made or mixed with linen, hempen, cotton, or woollen yarn, or shall wilfully and maliciously break and destroy any tools used in making or manufacturing of the same, not having the consent of the owner so to do.

Every such offender, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.

1. **A**LL persons, not having reasonable excuse, shall resort to their parish church or chapel (or to some congregation of religious worship allowed by the toleration act) on every *sunday*; on pain of punishment by the censures of the church, or of forfeiting 1 s. to the poor for every offence. Resorting to church on the Lord's-day.

2 *El. c. 2. s. 14, 24.*

2. King James the first, in 1618, publicly declared to his subjects, in what was called the book of sports, these games following to be *lawful*, viz. dancing, archery, leaping, vaulting, maygames, whitson ales, and morris dances; and did command that no such honest mirth or recreation should be forbidden to his subjects on *sundays* after evening service: But restraining all recusants from this liberty; and commanding each parish to use these recreations by itself; and prohibiting all *unlawful* games, bear baiting, bull baiting, interludes, and bowling, by the meaner sort. *Dalt. c. 46.* Sports on the Lord's-day.

3. And by the 7 *W. 3. c. 17. s. 1.* All persons shall on every *Lord's-day* apply themselves to the observation of the same, by exercising themselves in piety and true religion publicly and privately.

(2) And no person shall do any worldly labour or work of their ordinary callings upon the *Lord's-day*, works of necessity and charity only excepted. Exercising worldly callings on the Lord's day.

(3) And every person being of the age of fourteen years or upwards offending in the premisses, shall forfeit five shillings, and no person shall publicly cry, shew forth, or expose to sale, any fruit, herbs, or goods upon the *Lord's-day*, upon pain that every person so offending, shall forfeit the same.

4. No drover, horse-courser, waggoner, carrier, butcher, higler, or any of their servants, shall travel or come into their inn or lodging upon the *Lord's-day*, upon pain that every such offender shall forfeit twenty shillings. *s. 2.*

5. No persons shall play or exercise any hurling, commoning, foot-ball playing, cudgels, wrestling, or any other games, pastimes, or sports on the *Lord's-day*; and if any person shall offend therein and be thereof convicted as herein after directed, every such person shall forfeit twelve pence, to be immediately paid to such justice of the peace or officers before whom such conviction shall be. *s. 3.*

And if any person offending against this act, shall be thereof convicted before any justice of the peace or chief officers where the offence shall be committed, upon their view or confession of the party, or proof of one witness by oath, the said justice or chief officer shall give warrant to the constables or church-wardens of the parish where such offence shall be committed, to seize the goods cried, shewed forth, or put to sale as aforesaid, and to sell the same. *s. 4.*

(2) And to levy the other forfeitures by distress and sale of the goods of every such offender, &c. and in default of distress, or in case of inability of the offender to pay the said forfeitures, the party offending shall be set publicly in the stocks two hours. *Ibid.*

(3) And all the forfeitures aforesaid shall be employed to the use of the poor of the parish where the said offences shall be committed, saving that it shall be lawful for any justice, mayor, or head officer, out of the said forfeitures, to reward persons that shall inform of any offence against this act, so

Lord's Day.

so as such reward exceed not the third part of the forfeitures or penalties.
Ibid.

6. Nothing in this act shall extend to the prohibiting of dressing meat in families, or dressing or selling of meat in inns, cooks shops, or victualling-houses, for such as otherwise cannot be provided; nor the crying or selling of milk or fish before ten of the clock in the morning, or after four of the clock in the afternoon; nor to the using of hackney coaches in or about the city of *Dublin*. *f. 5.*

7. No person shall be prosecuted for any offence before-mentioned, unless they be prosecuted for the same, within ten days after the offence committed. *f. 8.*

8. No keeper of any tavern, ale-house, or publick victualling-house, shall entertain or permit to remain in his house any person during the time of divine service, except those who are of their own family, or lodgers in the said house, or furnish them with liquor of any sort, upon the penalty of forfeiting of ten shillings for every such offence, and also five shillings to be forfeited by every such person who shall enter or remain in such taverns, ale-houses, or victualling-houses, contrary to this act. *f. 9.*

9. All constables and churchwardens within cities and towns corporate, are required frequently to enter into all taverns, ale-houses, and victualling-houses, within their parishes or districts, where they shall reasonably suspect any person to be contrary to the intent of this act, and to apprehend such persons as they shall find, or reasonably suspect to be offenders against the same, and also the master of such house where such offenders shall be apprehended, and them in custody to carry before some justice of peace near the place. *f. 10.*

(2) Which justice is empowered to examine witnesses upon oath touching the breach of this law, and after examination to proceed to a conviction or acquittal of the persons accused, which shall be final to all parties. *ibid.*

(3) And if such justices shall upon proof convict the persons accused, the said justice shall demand from such offenders the penalties imposed by this act, and receive the same, and in default of payment commit the offender to the gaol of the county till he shall have made payment of the same, which sum shall be applied to the use of the poor of the respective parishes where such offences shall be committed. *ibid.*

10. Provided, nothing herein contained shall extend to persons who have been in any inns before, and design to abide there on *Sunday*, but it shall be lawful for such persons to remain in such inns and public-houses.

11. No person upon the lord's day, shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace), but the service thereof shall be void; and the person serving the same shall be as liable to answer damages to the party grieved, as if he had done the same without any writ, process, warrant, order, judgment, or decree. *7 W. 3. c. 17. f. 7.*

But this doth not extend to ecclesiastical process, as citations, or excommunications. *Gibbs. 271.*

A justice issued a warrant to the constable, to make a person to find sureties for his *good behaviour*: the constable executed the warrant on a *sunday*, and he was justified by the court; who resolved, that a warrant for the good behaviour

Lord's day.

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behaviour is a warrant for the peace, and more; and that this statute is to be favourably interpreted for the peace. *Raym* 250.

12. No hundred shall be answerable for any robbery on the lord's day: *Robbery on the lord's day.* Nevertheless the inhabitants shall make hue and cry after the offenders, on pain of forfeiting to the king as much money as might have been recovered by the party robbed against the hundred, if he had been robbed on any other day. 7 *W.* 3. c. 17. s. 6.

Warrant to levy 20s. on a carrier for travelling on the Lord's day; which same will do, *mutatis mutandis*, for the other penalties under this title.

Dublin. } To the constable of ——— in the said county, and to the church-wardens of the parish of ——— in the said county.

FORASMUCH as A. O. of ——— in the county of ——— carrier, is duly convicted before me J. P. esquire, one of his majesty's justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, for that he the said A. O. on the ——— day of ——— in the ——— year of the reign of ——— being the lord's day, commonly called Sunday, with his horses into and through the said parish of ——— did travel, contrary to the statutes in that case made and provided, whereby he hath forfeited the sum of 20s. of lawful money of England; these are therefore to command you forthwith to levy the said sum of 20s. by distraining the goods and chattels of him the said A. O. And if within the space of [five] days next after such distress by you taken, the said sum shall not be paid, together with the reasonable charges of taking and keeping the same, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay the sum of 6s. 8d. part of the said sum of 20s. to A. I. of ——— yeoman, who informed me of the said offence, and that you see the remaining sum of 13s. 4d. employed to the use of the poor of your said parish of ——— returning to him the said A. O. the overplus upon demand, the reasonable charges of taking, keeping, and selling the said distress, being first deducted. And you are to certify to me, with the return of this precept, what you shall have done in the execution thereof. Herein fail you not. Given under my hand and seal at ——— in the said county, the ——— day of ———.

Lunatics.

1. **N**ON compos mentis is of four kinds:

First, Ideots; who are of *non sane memory* from their nativity, by a perpetual infirmity.

Secondly, Those that lose their memory and understanding by the visitation of God, as by sickness, or other accident.

Thirdly, Lunatics; who have sometimes their understanding, and sometimes not.

Fourthly,

Lunaticks.

Fourthly, Drunkards; who by their own vicious act for a time deprive themselves of their memory and understanding. 1 *Inst.* 247.

Inciting him to
commit a
crime.
Not punishable
for criminal of-
fences.

2. He who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. 1 *Haw.* 2.

Not punishable
for criminal of-
fences.

3. But ideots and lunaticks, who are under a natural disability of distinguishing between good and evil, are not punishable by any criminal prosecution. 1 *Haw.* 2.

Yet drunkards shall have no privilege by their want of sound mind; but shall have the same judgment as if they were in their right senses. 1 *Inst.* 247. 1 *Haw.* 2. 1 *H. H.* 32.

Punishable for
civil offences.

4. But if a person, who wants discretion, commit a trespass, against the person or possession of another; he shall be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2.

Becoming non
compos before
trial.

5. If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. *Hale's Pl* 10. 1 *Haw.* 2.

How tried
whether he is
non compos.

6. By the common law, if it be doubtful whether a criminal, who at his trial in appearance is a lunatick, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff; and if it be found by them, that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as one that stands mute. 1 *Haw.* 2.

Can't bring an
appeal.
Or be an ap-
prover.

7. An ideot cannot bring an appeal. 1 *Haw.* 162.

8. Neither can he be an approver; because he can neither take the oath in that case required, nor wage battle. 3 *Inst.* 129.

Friends re-
straining him.

9. Any person may justify confining and beating his friend being mad, in such manner as is proper in such circumstances. 1 *Haw.* 130.

King the guar-
dian of luna-
ticks.

11. The king is the general guardian of ideots and lunaticks. 17 *Ed.* 2. *ft.* 1. c. 9, 10.

Whether he
may avoid his
own act.

12. A person of *non sane* memory shall not avoid his own act, by reason of this defect; but his heir or executor may. 4 *Co. Beverly's case.*

Whether he
may consent to
marriage.

13. If an ideot takes a wife, they are husband and wife in law, and their issue legitimate; for he is allowed to be capable of consenting to marriage. 1 *Sid.* 112.

Maim.

1. **M**AIM is such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary. 1 *Haw.* 111.

2. For the members of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country, when occasion shall be offered: and therefore a person who maims himself, that he may have the more colour to beg, may be indicted and fined. 1 *Inst.* 127.

And by the like reason, a person who disables himself, that he may not be impressed for a soldier.

3. The cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye, or foretooth, or castrating him, are said to be maims, but the cutting off his ear, or nose, were not esteemed maims at the common law, because they do not weaken but only disfigure him. 1 *Haw.* 111, 112.

4. It

4. It is said, that anciently castration was punished with death; and other maims with the loss of member for member: but afterwards no maim was punished in any case with the loss of life or member, but only with fine and imprisonment. 1 *Haw.* 112.

But now by the 11 G. 2. c. 8. If any person, on purpose, and of malice forethought, and by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject, with intention in so doing to maim or disfigure him; the person so offending, his counsellors, aiders, and abettors (knowing of and privy to the offence) shall be guilty of felony without benefit of clergy; but not to work corruption of blood.

5. If a man attack another with intent to murder him, and he does not murder, but only maim him; the offence is nevertheless within this statute. 1 *Haw.* 112.

6. If the maim comes not within any of the descriptions in the act, yet it is indictable at the common law, and may be punished by fine and imprisonment: Or an appeal may be brought for it at the common law; in which the party injured shall recover his damages: Or he may bring an action of trespass; which kind of action hath now generally succeeded into the place of appeals in smaller offences not capital. 2 *Haw.* 157—160.

7. It doth not seem, that in maiming there may be accessaries after the fact. 2 *Haw.* 311.

For maiming of cattle, see title **Cattle**.

Maintenance.

BUYING of titles belongeth not to this place, but is treated of under a title of its own.

- I. Of maintenance in general.
- II. Of champerty in particular.
- III. Of embracery in particular.

I. Of maintenance in general.

Concerning which I will shew,

- i. *What it is.*
- ii. *How punishable by the common law.*
- iii. *How by statute.*

i. What it is.

1. Maintenance (*manu tenere*) is an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. 1 *Haw.* 249.

S f f

2. And

2. And it is twofold ;

One in the *country* ; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty ; or where one stirs up quarrels, and suits in the country, in relation to matters wherein he is no way concerned : And this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not ; but it is said not to be actionable. 1 *Haw.* 249.

Another in the *courts of justice* ; where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money or otherwise, in the prosecution or defence of any such suit. 1 *Haw.* 249.

3. Of this second kind of maintenance, there are three species ;

First, where one maintains another, without any contract to have part of the thing in suit ; which generally goes under the common name of *maintenance* :

Secondly, where one maintains one side, to have part of the thing in suit ; which is called *champerty* :

Thirdly, where one laboureth a jury ; which is called *embracery*. 1 *Haw.* 249.

4. But it seemeth to be agreed, that wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, by the same title, they may maintain one another in a suit relating to the same. 1 *Haw.* 252.

5. Also, that whoever is any way of kin or affinity to the party, may counsel and assist him, but that he cannot justify the laying out any of his own money in the cause, unless he be either father, or son, or heir apparent. 1 *Haw.* 252.

6. Also, that any one in charity may lawfully give money to a poor man, to enable him to carry on his suit. 1 *Haw.* 253.

ii. How punishable by the common law.

It seemeth that all maintenance is not only *malum prohibitum* by statute, but is also *malum in se*, and strictly prohibited by the common law, as having a manifest tendency to oppression ; and therefore it is said, that all offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be indicted as offenders against publick justice, and adjudged thereupon to such fine and imprisonment as shall be agreeable to the circumstances of the offence. Also it seemeth, that a court of record may commit a man for an act of maintenance done in the face of the court. 2 *Inst.* 212. 1 *Haw.* 255.

iii. How by statute.

1. By the 1 *Ed.* 3. *st.* 2. *c.* 14. No person shall take upon him to maintain quarrels, nor parties in the country, to the disturbance of the common law.

2. And

2. And by the 20 Ed. 3. c. 4. *None shall take in hand quarrels, other than their own, nor the same maintain, by them nor by other, for gift, promise, amity, favour, doubt, fear, nor other cause, in disturbance of law, and hindrance of right.*

3. And by the 1 R. 2. c. 4. *None shall take or sustain any quarrel by maintenance in the country, on pain, if he is a great officer, as the king by advice of the lords shall ordain; if he is a lesser officer, he shall forfeit his office, and be imprisoned and ransomed at the king's will; and all other persons, on pain of imprisonment, and ransom at the king's will.*

Also by the 10 C. 1. ff. 3. c. 15. *No person shall unlawfully maintain, or procure any unlawful maintenance, in any action, demand, or complaint, in any court having power to hold plea of lands; nor shall unlawfully retain any person for maintenance of any plea, to the disturbance or hindrance of justice; on pain of 10l. half to the king, and half to him that shall sue within one year. f. 3, 6.*

Unlawfully maintain] It seemeth that in an information on this statute, it is not sufficient to say, that the defendant maintained the party, without adding that he did it *unlawfully*. 1 Haw. 256.

Having power to hold plea of lands] It is said to have been adjudged, that maintenance of a suit in a spiritual court, is neither within this nor any other statute concerning maintenance. 1 Haw. 256.

To hold plea] It hath been holden that in an information on this statute, it is necessary to shew, that a plea was depending; and therefore that it is not sufficient to say that a bill was exhibited. 1 Haw. 256.

II. Of champerty in particular.

i. *What it is.*

ii. *How punishable by the common law.*

iii. *How by statute.*

i. *What it is.*

Champerty (from *campi parte*) is the unlawful maintenance of a suit, in consideration of some bargain to have part of the lands or thing in dispute, or part of the gains. 1 Haw. 256. 33 Ed. 1. ff. 2.

Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a species of maintenance which is the genus. 2 Inst. 208.

ii. *How punishable by the common-law.*

Champerty was an offence at the common law, and as such is punishable in like manner as hath been expressed in treating of maintenance in general. 2 Inst. 208.

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iii. *How*

iii. *How by statute.*

1. By the 3 Ed. 1. c. 25. *No officer of the king, by himself, nor by other, shall maintain pleas, suits, or other matters hanging in the king's courts, for lands, tenements, or other things for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the king's pleasure.*

By covenant made] That is, by agreement either by word or writing; for albeit in the common sense, a covenant is taken for an agreement by writing; yet in a larger sense it is taken (as it is here) for an agreement by writing or by word. 2 *Inst.* 209.

2. And by the 28 Ed. 1. c. 11. *No person whatsoever, for to have part of the thing in plea, shall take upon him the business that is in suit, nor shall any upon such covenant give up his right to another; on pain that the taker shall forfeit to the king the value of the part he hath purchased for such maintenance. But no person shall be prohibited hereby to have counsel of pleaders, or of men learned in the law, for their fee; or of his parents and next friends.*

3. And by the 33 Ed. 1. ft. 3. *Any person who shall take for maintenance, or the like bargain, any suit or plea against another; he, and also they who consent thereunto, shall be imprisoned three years, and make fine at the king's pleasure.*

4. And by the 1 R. 2. c. 9. *A feoffment of lands, or gift of goods, for maintenance, shall be void, and the person disseized shall recover the lands against the first disseisors, with double damages, without having any regard to alienations.*

Shall be void] But it is said that it shall only be void with regard to him that hath right, and not between the feoffor and feoffee. 1 *Inst.* 369.

5. And by the 31 El. c. 5. *The offence of champerty may be laid in any county, at the pleasure of the informer.* f. 4.

III. Of embracery in particular.

i. *What it is.*

ii. *How punishable by the common law.*

iii. *How by statute.*

i. *What it is.*

1. It seems clear, that any attempt whatsoever to corrupt, or influence, or instruct a jury, or any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, is a proper act of embracery, whether the juror on whom such attempt is made
give

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give any verdict or not, or whether the verdict given be true or false. 1 Haw.

259.

2. And the law so far abhors all corruption of this kind, that it prohibits every thing which has the least tendency to it, what spacious pretence soever it may be covered with, and therefore it will not suffer a mere stranger so much as to labour a juror to appear and act according to his conscience.

1 Haw. 259.

3. But any person who may justify any other act of maintenance, may safely labour a juror to appear and give a verdict according to his conscience; but no one whatsoever can justify the labouring a juror not to appear. 1 Haw. 260.

ii. How punishable by the common law.

There is no doubt, but that offences of this kind, do subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law. 1 Haw. 260.

iii. How by statute.

1. By the 10 C. 1. ff. 3. c. 15. No person shall embrace any jurors on pain of 10l. half to the king, and half to him that shall sue within a year. f. 3, 6.

2. And by the 38 Ed. 3. st. 1. c. 12. If any juror shall take any thing to give his verdict; both he, and the embracer, shall forfeit ten times as much, half to the king, and half to him that shall sue.

Upon which statute is founded the writ of *Decies tantum*.

Indictment for maintenance.

THE jurors for our lord the king upon their oath present, that A. O. late of ——— in the county aforesaid, yeoman, on the ——— day of ——— in the ——— year of the reign of ——— with force and arms, at ——— aforesaid, in the county aforesaid, did unjustly and unlawfully maintain and uphold a certain suit, which was then depending in the court of our said lord the king, before the king himself, between A. P. plaintiff, and A. D. defendant in a plea of debt, on the behalf of the said A. P. against the said A. D. contrary to the form of the statute in such case made and provided, and to the manifest hindrance and disturbance of justice, and in contempt of our said lord the king, and to the great damage of the said A. D. and against the peace of our said lord the king, his crown and dignity.

I. Unlawful

- I. Unlawful combinations.*
- II. Leaving work unfinished.*
- III. Employing artificers retained by others.*
- IV. Wages to be paid in money.*
- V. Over-charging employers.*
- VI. Assaulting masters or fellow journeymen.*
- VII. Embezzling materials or tools.*
- VIII. Receiving embezzled goods, &c.*
- IX. Goods, &c. found upon search.*
- X. Damaging or destroying goods, &c.*

I. Unlawful combinations.

1. **B**Y the 3 G. 2. 14. *f. 1.* Whereas workmen, artificers, and others, concerned in several trades and manufactures, have without any charter or authority formed themselves into unlawful clubs and societies, and have presumed contrary to law to enter into combinations, and to make by-laws, by which they pretend to regulate the trade and the prices of goods, and to advance their wages unreasonably, and many other things to the like purpose; all contracts, covenants, or agreements, and all by-laws, rules, or orders, in such unlawful clubs or societies, made or entered into by any persons exercising any trades and manufactures, for regulating the said trade, or for regulating or settling the prices of goods, or for advancing their wages, or for lessening their usual hours of work, shall be illegal and void.

2. If any persons concerned in trades and manufactures, shall keep up, continue, act in, make, enter into, sign, seal, or be knowingly concerned in any contract, covenant, or agreement, by-law or order of any club, society, or combination, by this act declared to be illegal, or shall attempt to put any such illegal agreement, by-law, or order in execution, every person so offending, being thereof convicted upon the oath of one credible witness, before any two justices of the peace for the county or place where such offence shall be committed, upon any prosecution within three calendar months after the offence, shall by order of such justices, at their discretion, be committed either to the house of correction, there to be kept to hard labour for any time not exceeding three months, or to the common gaol of the county or place where such offence shall be committed, without bail or mainprize, for any time not exceeding three months. *f. 2.*

3. And by the 17 G. 2. *c. 8. f. 4.* All meetings and assemblies, where three or more persons not incorporated by charter assemble or meet together, and make any by-law or order, or give any direction any way relating to journeymen, or apprentices, or servants, or for the collection of money for the support of journeymen who do not work at their several trades, or of apprentices, or of servants who are out of service, or under pretence of providing for the wives and children of such journeymen, apprentices, or servants,

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servants, or for the use of any members of such societies upon any pretence, shall be deemed as unlawful assemblies. *f. 3.*

(2) And the houses where such persons to the number of three or more usually meet, shall be adjudged common nuisances, and the master or mistress of such house, if it be made appear that he or she knowingly permitted such assemblies, shall be prosecuted by presentment or indictment for such offence, and being thereof convicted, shall be punished as those who keep common bawdy-houses are punishable. *ibid.*

(3) And all persons as well journeymen, apprentices, and servants, who receive wages, as others not incorporated by charter, who enter into any contract, covenant, or articles, any way relating to journeymen, apprentices, or servants, or who shall collect or pay any money for the support of the persons meeting in such clubs or societies, being convicted of such offence before two justices, in the manner by the act 3 G. 2. c. 14. directed, and within the time by the said act limited, shall be punished in such manner as by the said act is directed. *ibid.*

4. It shall be lawful for such justices, and they are required upon any information given them against persons so offending, to issue summonses to any persons to appear before them as witnesses on such prosecution. *f. 4.*

(2) And in case persons so summoned shall neglect to appear, being duly served with such summons, such persons shall forfeit for such neglect forty shillings to the informer, to be levied by distress and sale of the offenders goods, by warrant of the said justices. *ibid.*

(3) And in case no sufficient distress can be found, such justices are required by warrants, to send the said offenders to the common gaol for one month, unless such offenders shall sooner submit to be examined. *ibid.*

5. Provided, that nothing said by any person who shall be examined as a witness on any such indictment, or before such justices, shall be given in evidence against such persons who shall be so examined, on any information or indictment he may be charged with, or before any two justices on this or the former act. *f. 5.*

II. Leaving work unfinished.

1. By the act 3 G. 2. c. 14. *f. 3.* If any person actually retained or employed as an artificer, workman, servant, or labourer, in any trades or manufactures, shall depart from his service before the end of the time for which he shall be hired or retained, or shall quit his work for the space of three days, or return his work before the same shall be compleatly finished, without the consent of the persons by whom he shall be so employed or retained, unless it be for some sufficient cause to be allowed by two justices of the peace in their respective jurisdictions; every person so offending, being thereof lawfully convicted before two justices as aforesaid, shall forfeit five pounds, one half thereof to the informer, and the other half to the poor of the parish; which five pounds the said justices are required to levy by their warrants, for distress and sale of the offenders goods, and for want of sufficient distress, to commit the parties offending to the house of correction, there to be kept to hard labour for any time, not exceeding three months.

2. Provided,

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2. Provided, that if the persons so employing or retaining any such artificer, servant, workman, or labourer, shall not constantly furnish him with proper materials, or shall not pay and discharge all such wages and hire as the same shall become due, according to agreement, such want of materials or non-payment of wages being first proved before two justices, in every such case, such artificer, &c. shall not be liable to the penalties before mentioned, for departing from his service or quitting or returning his work as aforesaid. *f. 4.*

3. It shall be lawful for the persons so employing any such artificer, &c. to employ any other persons to finish and compleat such work as shall be so left by any such artificer, &c. and the person who shall be employed to finish such work, though not free of any corporation, shall not be liable to any fines and penalties that may be imposed by any court or corporation for his finishing the said work. *f. 5.*

(2) And if any dispute shall arise between any master-workman or other person employing any such artificer, &c. about the goodness of materials, or whether the same be fit, or a sufficient quantity given for the work for which they were intended, upon application made by either of the parties to one justice, such justice is required to give directions to the master and wardens of the corporation or trade professed by either of the parties, and in such places where no corporation is subsisting, then to any other experienced person to examine into the premises, and the decision so made therein by the said master and wardens or other experienced person is to be definitive. *ibid.*

4. In case of such disputes, if any workman shall provide stuff or materials without the consent of the employer, before the determination first had as aforesaid, under pretence of making a particular charge thereof or otherwise, it shall be lawful for such employer or master-workman to refuse payment for the same, and to plead the general issue in any action to be brought upon account thereof, &c. *f. 6.*

5. And by the 31 G. 2. c. 5. *f. 9.* If any person, who shall be hired, retained, or employed to prepare or work up any of the manufactures herein before mentioned, for any one master, shall neglect or refuse the performance thereof, by procuring or permitting himself or herself to be subse- quently retained or employed by any other person, before he or she have compleated the work which he or she was first and originally so hired, re- tained, or employed to perform, and which was first delivered to him or her, the person so offending, being thereof lawfully convicted by the oath or (being of the people called *Quakers*) affirmation of one credible witness, before one justice of the peace of the county where the offence shall be committed, the persons so convicted, shall be sent to the house of cor- rection, there to be kept to hard labour, for any time not exceeding one month.

6. Provided, that no person shall, by virtue of any act heretofore made, or of any thing herein contained, suffer, or be liable to suffer twice for one and the same fact or offence.

III. Employing artificers retained by others.

By the act, 3 G. 2. c. 14. s. 7. If any master-workman, or other person by his direction or with his privity, shall knowingly receive, employ, or entertain, any artificer, workman, servant, or labourer, already employed or retained by another, during the time he is so employed or retained, without leave of the persons by whom he is so employed or retained, every such offender being thereof convicted, shall for every such offence forfeit five pounds, one half thereof to be given to the person aggrieved, and the other half to the poor of the parish where such offence shall be committed, the same to be levied by distress and sale of the offenders goods and chattels, by warrant of any one justice; and for want of distress such justices shall commit the persons so offending to the common gaol of the county or place where such offence shall be committed, for any time not exceeding three months.

IV. Wages to be paid in money.

1. By the act, 3 G. 2. c. 14. s. 9. Every person concerned in employing any artificers, workmen, servants, or labourers, in any trades or manufactures, shall pay unto all persons by them employed in the trades and manufactures aforesaid, the full wages or other price agreed on in money, and shall not pay the said wages or other price agreed on, or any part thereof, in goods, or by way of truck, or in any other manner than in money, or make any deduction from such wages or price, on account of any goods sold or delivered previous to such agreement by any person whatsoever, or in order to pay any alehouse or tavern scores, or other debts, without the consent of the persons so by them hired and employed.

2. It shall be lawful for any two justices of the peace, and they are hereby required upon complaint made for that purpose, to summon before them the parties offending, he or she not being a peer or peers of this realm, and for non-payment of such wages, or price agreed on in money, or sufficient satisfaction given for the same, to the good liking of the parties aggrieved, to issue their warrants for levying such wages or price agreed on, due as aforesaid, provided the same shall not exceed three pounds, by distress and sale of the offenders goods; and for want of sufficient distress, to commit the parties offending to the common gaol of the county or place where such offence shall be committed, until they shall pay such wages or price agreed on, in money as aforesaid, or give full satisfaction for the same, to the good liking of the party aggrieved. s. 10.

3. Provided that it shall be lawful for any person aggrieved by any order to be made by two justices in pursuance of this act, to appeal to the justices at the next general quarter-sessions to be holden for the county or place where such order shall be made, giving reasonable notice of such appeal, the reasonableness of which notice shall be determined by the justices at the quarter-sessions to which the appeal is made; and if it shall appear to them that reasonable time of notice was not given, they shall adjourn the said appeal to the next quarter-sessions, and then and there finally determine the

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same; and the justices who in the general quarter-sessions shall hear the matter, shall have power to award reasonable costs to either party. *f. 11.*

4. And by the 17 G. 2. c. 8. *f. 7.* In case any persons concerned in employing any artificer, workmen, servants, or labourers, in any trades or manufactures, shall pay any such artificer, &c. their wages, or other price agreed on, or any part thereof, either in goods or by way of truck, or in any other manner than in ready money, and shall be thereof convicted upon the oath of one credible witness before any two justices of the peace for the county or place where such offence shall be committed, upon an information exhibited within three calendar months after such offence committed, and which such justices are required to take, *they* shall forfeit ten pounds, to be paid to the informer, to be levied by warrants of such justices for distress and sale of the offenders goods.

5. Provided that it shall be lawful for any person aggrieved by any order to be made by any two justices in relation to workmen or artificers wages, or paying them in truck instead of money, to appeal to the justices at the next general quarter-sessions to be holden for the county or place where such order shall be made, who are hereby impowered to determine the same, and to award reasonable costs to either party who shall appear to be aggrieved.

V. Over-charging employers.

By the act, 3 G. 2. c. 14. *f. 12.* No master-workman, overseer, or undertaker of any work, who shall employ any workmen or journeymen under him at daily or weekly wages, shall upon any pretence charge his employer with any further sums of money for the wages of such workmen or journeymen, than what such master-workman, overseer or undertaker, shall actually and *bona fide* pay to such workmen or journeymen; and in case such master-workman, overseer, or undertaker, shall offend herein, such master-workman, overseer, or undertaker, shall forfeit for every such offence ten pounds, to be recovered by civil bill in such manner as small debts are recoverable.

VI. Assaulting masters or fellow-journeymen.

By the act 5 G. 2. c. 4. *f. 13.* If any undertaker or journeyman shall strike or assault any other journeyman for working for their employer, or shall be any way aiding or assisting therein, or if any undertaker or journeyman shall assault his master or employer, for employing whatsoever persons he shall judge proper in his work and service, every person so offending, being thereof upon complaint of the parties aggrieved lawfully convicted upon the oath of one credible witness, before any two justices of the peace for the county or place where such offence shall be committed, within three months after the offence committed, shall for every such offence forfeit forty shillings, one half thereof to the persons aggrieved, and the other half to the poor of the parish where such offence shall be committed; and for default of payment thereof, such offenders shall be committed to the common gaol for any term not exceeding three months.

VII. Embezzling

VII. Embezzling materials or tools.

1. By the act, 31 G. 2. c. 10. s. 1. If any person, who shall be hired or employed to make any felt or hat, or to prepare or work up any fustian, cotton, furr, iron, woollen, mohair, or silk manufactures, or any manufactures made up of cotton, furr, wool, mohair, or silk, or of any of the said materials mixed one with another, shall purloin, embezzel, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any of the materials, with which they shall be respectively intrusted, whether the same, or any part thereof, be or be not first wrought into merchantable wares, or shall secrete, sell, pawn, exchange, or otherwise unlawfully dispose of the working-tools with which they shall be respectively intrusted, and shall be thereof lawfully convicted, by the oath (or if the owner thereof be of the people called *Quakers*) solemn affirmation of the owner of such goods or materials, or by the oath or affirmation of any other credible witness, or by the confession of the persons charged with such offence, before any justice of the peace of the county, town, or place where such offence shall be committed, or where the persons so charged shall reside or inhabit (which oath or affirmation the said justices are required to administer) it shall be lawful for the said justices, by warrant under their hand and seal, to commit the persons so convicted to the house of correction, or other publick prison of such county or place, there to be kept to hard labour for fourteen days; and also to order the person so convicted, to be once publicly whipped at the market-place, or some other publick place of the place where such offenders shall be respectively committed.

(2) And in case of a further conviction, in manner before prescribed, for a subsequent offence of the same kind, it shall be lawful for the justice before whom such conviction shall be had, to commit the person so again offending to the house of correction, or other publick prison as aforesaid, there to be kept to hard labour for any time not exceeding three months, nor less than one month; and also to order the persons so again offending, to be publicly whipped at the market-place, or some other publick place of the town, or place where such offenders shall be respectively committed, twice, or oftner, as to such justices shall appear reasonable.

2. If any person intrusted with any of the materials herein before mentioned, in order to prepare, work up, or manufacture the same, shall not use all such materials in the preparing, working up, or manufacturing of the same, and shall neglect or delay, for fourteen days after such materials shall be prepared, worked up, or manufactured, to return (if required by the owners of such materials so to do) so much of the said materials as shall not be used as aforesaid, to the persons intrusting them therewith, such neglect or delay shall be adjudged to be an embezzling or purloining of such materials, and the persons so neglecting or delaying, being thereof convicted, in manner before prescribed for the conviction of offenders against this act, shall suffer the like punishment as persons convicted of embezzling or purloining any of the materials herein before mentioned are liable to. s. 7.

3. It shall be lawful for one justice of the peace of any county, division, liberty, city, town, or place, and he shall, upon complaint to him made upon oath, or (if the person complaining be of the people called *Quakers*) solemn

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solemn affirmation, of any offence herein before mentioned, committed within the said county, to issue his warrant for apprehending and bringing before him, or before any other justice of the peace of the said county, the persons charged with such offence; and the justices, before whom such persons shall be brought, are required to hear and determine the matter of every such complaint, and to proceed to conviction and judgment thereupon. *f. 8.*

VIII. Receiving embezzled goods, &c.

1. By the act, 31 G. 2. c. 10. *f. 2.* If any person shall buy, receive, accept, or take by way of gift, pawn, pledge, sale, or exchange, or in any other manner, from any person hired or employed to make any felt or hat, or to prepare or work up any fustian, cotton, furr, iron, woollen, mohair, or silk manufactures, or any manufactures made up of cotton, furr, wool, mohair, or silk, or of any of the said materials mixed with one another, any thrums or ends of yarn, or any other materials of furr, cotton, iron, wool, mohair, or silk, whether the same, or any part thereof, be or be not first wrought, made up, or manufactured, or any working-tools belonging to the said manufacturers, knowing the persons of whom they so buy, receive, accept, or take the said goods or materials to be hired, or employed, or intrusted as aforesaid, and not having first obtained the consent of the persons so hiring or employing and intrusting them, who shall offer to sell, pawn, pledge, exchange, or otherwise dispose of the said goods or materials, or shall buy, receive, accept, or take, in any manner from any other person, any of the said materials, whither the same be or be not first wrought, made up, or manufactured, or the said working-tools, knowing the same to be so purloined or embezzled; the persons so buying, receiving, accepting, or taking any such goods or materials, or working-tools, being thereof convicted in manner before prescribed, for the conviction of persons purloining or embezzling the said goods or materials, shall, for the first offence, forfeit five pounds.

(2) And in case the said forfeiture shall not be immediately paid, the justice, before whom such conviction shall be had, shall commit the parties so convicted to the house of correction, or other publick prison as aforesaid, there to be kept to hard labour for fourteen days, unless the said forfeiture shall be sooner paid; and if within two days before the expiration of the said fourteen days the said forfeiture shall not be paid, the said justices are required to order the persons so convicted to be publicly whipped at the market-place, or some other publick place where such offenders shall be respectively committed, once or oftner, as to such justices shall appear reasonable.

(3) And in case of a further conviction for any other subsequent offence of the same kind, the persons so again offending, being thereof convicted in manner before prescribed by this act, shall, for every subsequent offence forfeit ten pounds.

(4) And in case the said forfeiture shall not immediately be paid, the justice before whom such conviction shall be had, shall commit the parties so convicted to the house of correction, or other publick prison as aforesaid, there to be kept to hard labour for any time not exceeding three months, nor less than one month, unless the said forfeiture shall be sooner paid.

(5) And

(5) And if within seven days before the expiration of the time for which such offenders shall be so committed, the said forfeiture shall not be paid, the said justices are required to order such offenders to be publickly whipped at the market-place, or some other public place where they shall be respectively committed, twice, or oftner, as to such justices shall appear reasonable.

(7) And the said respective forfeitures of five pounds, and ten pounds, when recovered, after satisfaction shall have been made thereout to the parties injured, together with such costs of prosecution as shall be judged reasonable by the justice before whom such conviction shall have been had, shall be equally distributed among the poor of the parish or place where the person so convicted shall reside.

2. Provided that if any person convicted as aforesaid of buying, receiving, or taking to pawn, any of the materials herein before mentioned, shall think himself or herself aggrieved by the judgment of the justices before whom he or she shall have been convicted, such person shall have liberty to appeal to the justices at the next general or quarter-sessions of the peace which shall be held for the county or place where such judgment shall have been given.

And that the execution of the said judgment shall in such case be suspended, the person so convicted, entering into a recognizance at the time of such conviction, with two sufficient sureties, in double the sum which such person shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forth-coming to abide the judgment and determination of the justices, in the said general or quarter-sessions; which recognizance the said justices before whom such conviction shall be had, shall hereby be impowered and required to take, and the justices in the said sessions shall hear and finally determine the matter of the said appeal, and award such costs as to them shall appear just and reasonable, to be paid by either party.

And if upon hearing of the said appeal, the judgment of the justices before whom the appellant shall have been convicted, shall be affirmed, such appellant shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expences sustained by the defendant or defendants in such appeal.

Or in default of making such payments, shall suffer the respective pains and penalties by this act inflicted upon persons who shall neglect to pay the respective forfeitures by this act imposed upon such as shall be convicted of buying, receiving, or taking to pawn, any of the goods or materials herein before mentioned, which shall have been purloined or embezzled; and the determination of the said justices at the said sessions shall be absolutely final and conclusive.

IX. *Embezzled goods, &c. found upon search.*

1. By the act, 31 G. 2. c. 10. s. 4. If any person shall be charged with, and afterwards convicted of purloining or embezzling any of the aforesaid goods or materials, or of buying or receiving the same, in manner before described, it shall be lawful for the justice of the peace before whom such conviction shall be had, to issue a warrant under his hand and seal,

seal, directed to any person or persons, empowering them, in the presence of a constable, and in the day-time, to enter into, and search the houses, out-houses, shops, cellars, vaults, and other places belonging to the persons so convicted; and if upon such search there shall be found any thrums or ends of yarn, or any other materials of furr, cotton, iron, wool, mohair, or silk, or any working-tools belonging to the said manufactures, it shall be lawful for the persons empowered to make such search, to bring such goods or materials before the said justices, to be by them detained and kept in safe custody.

(2) And if within ten days next after such thrums or ends of yarn, or other goods or materials shall be so taken and detained, it shall be made appear to the satisfaction of the said justices, that the persons from whose houses, out-houses, shops, cellars, vaults, or other places as aforesaid, the said goods or materials shall be so taken and detained, are the lawful owners thereof, and came to the possession of the same in an honest and lawful manner, then all such thrums or ends of yarn, or other materials so taken and kept as aforesaid, shall be restored to the persons out of whose custody or possession the same shall have been so taken.

(3) But in case it shall not be made appear, within the time before limited, to the satisfaction of the said justices, that the persons convicted as aforesaid, are the lawful owners of the said materials so taken and detained, then the said materials shall be adjudged to be purloined or embezzled, and it shall be lawful for the said justices, to direct all such thrums or ends of yarn, or other materials, to be publickly sold, and the money arising from such sale (the charges of such sale being first deducted) to be equally distributed among the poor of the parish or place where the persons so convicted reside.

2. Provided, that the said justices shall, within three days after such materials shall be brought to them, as aforesaid, give notice thereof in writing, under their hand and seal, to the persons convicted as aforesaid, appointing in such notice, a time and place for their attending, in order to make out, and prove their property in such materials so taken and detained, which time so to be appointed shall be within fourteen days, and not less than ten days after such notice given. *§. 5.*

(2) And if the persons so convicted, shall be detained in any house of correction, or other prison, as aforesaid, the said justices shall also cause a copy of the said notice, attested under their hand and seal, to be delivered to the master or keeper of such house of correction, or other prison, which master or keeper is required to bring, before such justices, the persons named in such notice, at the time and place therein specified, if the persons named in such notice be then in the custody of such master or keeper.

(3) And if any such master or keeper shall neglect or refuse so to do, such master or keeper shall, for every such neglect or refusal, forfeit to the persons respectively named in such notice, the full value of the materials so taken, detained, and sold, to be recovered by distress and sale of the goods and chattels of such master or keeper, by warrant under the hand and seal of the justice signing such notice, in case the said forfeiture shall not be immediately paid.

4. Provided also, that if any person shall think himself or herself aggrieved by the judgment or order of the said justices, relating to the sale or disposal of

of the said materials, so found and detained, such person shall have liberty to appeal against the judgment or order of the said justices, to the justices of the peace in the general or quarter sessions of the peace, which shall be held for the same county or town, next after such judgment or order shall be made. *f. 6.*

(2) And that in the mean time, the sale and disposal of such materials shall be postponed, notice in writing under the hand of the person intending to appeal, signifying such his or her intention, being given to the justice by whom such order shall have been made, before the time appointed for the sale and disposal of such materials, and the justices of the said sessions of the peace shall hereby be authorized to summon and examine witnesses upon oath (or being of the people called *Quakers*, upon their solemn affirmation) and to hear and finally determine the matter of the said appeal.

(3) And in case the said appellant shall not prosecute such his or her appeal, or for any other cause, the judgment of the said justices, by whom such order shall have been made, shall be affirmed, it shall be lawful for the justices in the said sessions, to award such costs, as they in their discretion shall think reasonable to be paid by the appellant for defraying the expences sustained by the defendants in such appeal, and the determination of the said justices, at the said sessions, shall be final.

X. Damaging or destroying goods, &c.

1. By the act 3 G. 2. c. 14. *f. 8.* If any artificer, workman, Tervant, or labourer, hired, retained, or employed, in any trades and manufactures, shall wilfully damnify or destroy without the consent of the persons by whom he shall be so employed, any of the goods or work committed to his charge, or wherewith he shall be intrusted, every such offender and his accomplices being thereof convicted as is before mentioned, shall forfeit to the owners of such goods or work so damnified or destroyed, double the value thereof, to be levied by distress and sale of the offenders goods, by warrant of any two justices, and for want of sufficient distress, such justices shall commit the parties so offending to the house of correction, there to be kept to hard labour for any time not exceeding three months, or until satisfaction be made to the parties aggrieved.

2. And by the 31 G. 2. c. 10. *f. 13.* If any person shall by day or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any fustian, cotton, woollen, mohair, or silk goods, in the loom, or any tools employed in the making thereof, or shall wilfully and maliciously cut or destroy any fustian, cotton, woollen, mohair, or silk goods, in the loom, or on the rack, on which any of the aforesaid goods are hanged, in order to dry, and shall wilfully and maliciously break or destroy any tools used in the making of fustian, cotton, woollen, mohair, and silk goods, not having the consent of the owner so to do, every such offender, being thereof lawfully convicted, shall be adjudged guilty of felony, without benefit of clergy.

1. By

1. **BY** the statutes 6 *Ann. c. 16. s. 6.* If any popish priest shall celebrate marriage contrary to this act, or shall celebrate matrimony between any persons knowing that at the time of such marriage either of them is of the protestant religion, every such popish priest so offending, and being thereof convicted, shall be judged to be a popish regular, and shall suffer all the pains, penalties and forfeitures, of a popish regular.

2. And by the 8 *Ann. c. 3. s. 28.* To the end that no popish priest may pretend that he did not know either of the parties at any time married by him to be of the protestant religion, if any popish priest shall be prosecuted for offending contrary to the statute 6 *Ann. cap. 16.* and it doth appear that the persons so married, or any one of them, were protestant at the time of the marriage, it shall be presumed and concluded that the said popish priest so accused did celebrate matrimony between the said persons, knowing at the time of such marriage that they or one of them were of the protestant religion, unless the said popish priest shall produce and prove certificates, under the hands and seals of the ministers of the parishes where the parties so married did at the time of the said marriage respectively inhabit or reside, certifying that the said persons were not of the protestant religion at the time of the celebration of the said marriage.

3. Moreover, by the 12 *G. 1. c. 3. s. 1.* If any popish priest, or reputed popish priest or person pretending to be a popish priest, or any degraded clergyman, or any layman pretending to be a clergyman of the church by law established, shall celebrate or take upon him to celebrate any marriage between two protestants or reputed protestants, or between a protestant or reputed protestant and a papist, such popish priest or reputed popish priest, and such degraded clergyman and layman pretending to be a clergyman, shall be guilty of felony without benefit of the clergy or of the statute.

4. It shall be lawful for any two justices of the peace, by warrants under their hands and seals, directed to any constable to summon persons suspected to be married by such popish priest or degraded clergyman, or layman pretending to be a clergyman of the church established, or to have been present at the celebration of such marriage, to appear before such justices at the time and place in such warrant mentioned, not being more than ten miles distant from their usual place of abode, and to examine such persons upon oath, where and by what persons, and with what form and ceremonies such marriage was celebrated, and what religion the persons so married professed, and who were present at such marriage. *s. 2.*

5. If the persons so summoned shall neglect to appear according to such summons, or shall refuse to be examined as aforesaid, or after examination shall refuse to enter into a recognizance to prosecute at the next assizes such as shall appear by such examination to have offended contrary to this act, such persons so neglecting to appear, having no lawful impediment, or refusing to be examined or to enter into recognizance as aforesaid, shall be committed by the said justices to the common gaol for three years, unless they shall sooner submit to be examined before the said justices, or one of them, or in case of their absence or refusal before some other justice, and shall enter into a recognizance to appear at the next general assizes to be held for the county

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county where the offence was committed, to prosecute such persons as shall appear by such examination to have offended contrary to this act, in which case it shall be lawful for such justice of the peace by warrant directed to the gaoler to discharge such persons from their commitment. *f. 3.*

6. No such examination shall subject the party examined, to any prosecution, penalty or forfeiture whatsoever, or be admitted to be given in evidence against the person so examined, unless such person shall be indicted for having committed wilful perjury in such examination. *f. 4.*

7. And by the 19 G. 2. c. 13. *f. 1.* Every marriage that shall be celebrated after the first day of May 1746, between a papist and any person who hath been or hath professed him or herself to be a protestant at any time within twelve months before such celebration of marriage, or between two protestants if celebrated by a popish priest, shall be absolutely null and void without any process judgment or sentence of law whatsoever.

8. Nevertheless, by the act 23 G. 2. c. 10. *f. 1.* Every popish priest or reputed popish priest, who shall celebrate any marriage contrary to the act 12 G. 1. c. 3. and be thereof convicted, such popish priest shall be guilty of felony without benefit of clergy or of the statute, although the marriage so celebrated by such popish priest be declared null and void by the act, 19 G. 2. c. 13.

Militia.

I. Appointment of lieutenants and officers.

II. Forming, training and leading the militia.

III. Persons chargeable to find men.

IV. Providing subsistence and carriages.

V. Seizing horses and arms.

VI. Punishment of disobedience and embezzlement.

VII. Stores for preserving militia-arms.

I. Of the appointing lieutenants and officers.

1. **B**Y the act 2 G. 1. c. 9. His majesty, his heirs and successors, or the chief governors of this kingdom, may issue forth commissions of lieutenancy and array to such protestants as his majesty or such chief governors shall think fit, to be his majesty's lieutenants governors and commissioners of array for the several counties, cities and places of Ireland, *f. 1. § 1.*

2. And his majesty or the said chief governors may give commissions to such persons as they shall think fit, to be colonels and other commission officers of the said persons so to be arrayed and armed, and the several lieutenants and governors shall present to his majesty, or to the chief governors, the names of such persons as they shall think fit to be their deputies, and in case such persons shall be approved of, they shall give them deputations accordingly. *f. 1. § 2.*

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3. Provided

3. Provided that his majesty or the chief governors may order otherwise, and at pleasure may put in or displace such lieutenants deputy-lieutenants, and officers, *f. 2.*

4. In counties of towns and cities where there are no lieutenants or governors, the commissioners of array for the said counties of towns and cities, shall have the same power within their district as the lieutenants, &c. for the several counties have by this act.

5. And by the 29 G. 2. c. 24. *f. 1.* All protestant dissenters, who by acting as commissioners of array, or officers of the militia of this kingdom have incurred any penalties, or incapacities, in the act 2 Ann. c. 6. (*to prevent the further growth of popery*) mentioned, by neglecting or omitting to qualify themselves, according to the said act, are hereby indemnified and discharged from all incapacities, disabilities, forfeitures and penalties, incurred by reason of such omission or neglect, and no acts done by them, and not yet avoided, shall be questioned or avoided, by reason of such neglect or omission; but all such acts are hereby declared to be as good and effectual as if such persons had taken and subscribed the oaths, and received the sacrament, and made and subscribed the declaration, *as by the said act is directed.*

6. It shall be lawful at all times hereafter, for all protestant dissenters, who shall be duly appointed by the king, &c. or by the chief governors of this kingdom, to act and be commissioners of array for the several counties, cities and places of this kingdom; and also to act and be officers in the militia of this kingdom, without qualifying themselves, according to the directions of the said act. *f. 2.*

7. Provided such protestant dissenters, to be hereafter appointed to the said offices, shall take and subscribe the oaths, and make, repeat, and subscribe the declaration, in such manner and in such places, and at such times as are directed and appointed by the said act. *f. 3.*

II. Forming, training, and leading the militia.

1. By the 2 G. 1. c. 9. The lieutenants, governors and commissioners of array for the several counties, &c. or the major part of them may call together all such persons being protestants, at such times, and arm and array them in such manner, as hereafter is declared, and to form them into companies, troops and regiments, and in case of insurrection, rebellion, or invasion, may cause them to be led or employed into any place in this kingdom, according as they receive directions from his majesty or the said chief governors. *f. 1. § 3.*

2. And the lieutenants, governors or deputies, or the major part of them assembled, being three at least, may command the several officers of the said militia, to train, exercise, and put in readiness, and also lead and conduct the persons so to be arrayed and armed by the directions and to the intent hereafter declared. *f. 2.*

3. It shall be lawful for the commissioners of array in their respective counties, or the major part of them assembled, not being less than three, to array and enlist all such protestants between the ages of sixteen and sixty, as they shall think fit. *f. 8. § 1.*

4. And

4. And upon complaint that any such protestant neglects or refuses to be arrayed or inlisted, or to find a sufficient man qualified according to this act, to be approved of as herein after is mentioned to serve in his stead, it shall be lawful for the lieutenants, &c. and commissioners of array, or the major part of them, after due summons served on such persons and refusal, to commit the said persons until they being arrayed, shall appear and enter into the service and inlist, or find such persons in their stead as aforesaid. *f. 8. § 2.*

5. And if such persons after being arrayed and inlisted, shall not appear at the usual summons at the place appointed for rendezvous, the commanding officer of each troop and company, may inflict a penalty on every horseman or dragoon not exceeding 5*s.* and on every footman 2*s.* 6*d.* for each day they shall neglect to attend the service, and in default of payment may imprison such persons for ten days. *f. 8. § 3.*

3. The ordinary times in every year for exercising and mustering the militia raised by virtue of this act, shall be the first *Monday* after the 25th of *March*, the first of *May*, *Tuesday* in *Whitsun-week*, and the 24th of *June*, and if the said first of *May* or 24th of *June* shall happen to fall on the Lord's day, then the militia are not to be exercised on that day, but on the day following.

4. The lieutenants, &c. and commissioners of array shall divide their counties into several districts for forming the militia into regiments, troops and companies as may be most convenient for the inhabitants, and the inhabitants shall from the time they are appointed to serve in such regiment, troop, or company attend the said service under the penalties aforesaid, and shall not serve in any other regiment, troop, or company.

5. And by the 19 G. 2. c. 9. His majesty's lieutenants or governors, and commissioners of array for the several counties, cities, and places of this kingdom, shall have authority to call together the militia in their several counties, &c. respectively, and them to lead, conduct, and employ, as well within the said several counties for which they shall be commissioned as into any other counties, according as they shall receive directions from his majesty, or the chief governors of this kingdom so to do; and the said militia shall draw out upon the days and times mentioned in the act 2 G. 1. c. 9. and also as often as the chief governors shall think necessary for the publick good and peace. *f. 1.*

III. Persons chargeable to find soldiers.

1. By the act 2 G. 1. c. 9. No person shall be obliged to serve in the militia who shall find a sufficient man that is a protestant qualified according to this act, to be approved of by his captain, subject to be altered upon appeal to the lieutenants and commissioners of array, &c. and every person so found and provided, shall serve as a soldier in such manner and under such penalties as before appointed.

2. Where any housekeeper or master of a family in any county of a city or town is a papist, such person shall find a sufficient man who is a protestant to serve in his stead, to be approved of by his captain.

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(2) And in case of any dispute between such papist and captain in relation to the sufficiency of such man, the same shall be determined by the commissioners of array, or the major part not being less than three.

(3) And in case such papist shall neglect or refuse to find such sufficient man, he shall forfeit double the sum as a protestant would forfeit in case such protestant should neglect to attend the service of the militia, when thereunto required by beat of drum or sound of trumpet as aforesaid.

2. Nothing in this act shall extend to the persons commonly called *Quakers*, to make them liable to pay as papists or nonjurors, but the said quakers shall pay only as protestants, in case they do not serve themselves in the militia, or find a sufficient person to serve in their stead, they making the following affirmation or declaration, if it be tendered them by any justice of peace.

3. Nothing herein contained shall affect the person or privilege of any member of either house of parliament.

IV. *Providing subsistence and carriages.*

1. By the act 2 G. 1. c. 9. It shall be lawful for the governors, lieutenants, deputy-lieutenants, or commissioners of array, or the major part of them, as often as any invasion, insurrection, or rebellion shall happen, towards the support of the said militia when in actual service, to suppress and oppose such invasion, &c. to raise such sums of money to be rateably apportioned upon the inhabitants and proprietors of land in their several counties and cities, in such manner and proportion as other county charges are assessed, not exceeding 6 *d.* for each footman, nor more than 12 *d.* for each horseman and dragoon, for each day they shall be in such service.

(2) Which sums so apportioned and raised shall be paid by the several tenants and occupiers of the land, and one moiety thereof shall be allowed the tenants or occupiers, by the landlords mediate and immediate, in proportion to the clear rents received by each of them.

2. The said lieutenants, &c. and commissioners of array, or the major part of them, may raise upon the popish inhabitants, and upon every person who shall refuse to take the oath of abjuration, which oath every justice of peace is impowered to tender, double the sum they should have paid by virtue of this act in case they had been protestants, and had taken the oaths appointed by several acts of parliament in *Great Britain* and this kingdom.

(2) And in case of such invasion, &c. whereby occasion shall be to draw out such militia into actual service out of their counties and places as aforesaid, then immediately after ten days time the said officers and private men may be mustered by the commissaries appointed for mustering the standing army.

(3) And shall be paid during such time as they shall be in actual service, the same pay as is allowed the standing forces in this kingdom, which pay shall issue out of his majesty's publick treasury, in the same manner as it is paid to the standing forces.

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3. The said lieutenants, &c. and commissioners of array, or the major part of them, or the chief officers upon the place, may take and provide carriages and horses for the carrying powder, bullets, and other materials, in the same manner, and allowing the same rate *per* mile outwards only for each horse to every such carriage, as are taken upon the marching of any regiment, company or troop of the standing army.

(2) The same to be paid as by 6 *Ann. c. 14.* And the said lieutenants, &c. or the chief officers upon the place, may imprison all mutineers as well officers as private men, or those who do not do their duty at the day of their musters and training, and other the aforesaid service, and may inflict for punishment for every such offence any pecuniary mulct, not exceeding 5*s. per diem*, or the penalty of imprisonment, not exceeding one calendar month.

4. If any person so to be assessed, shall refuse or neglect by a reasonable time appointed by the said lieutenants, &c. and commissioners of array, to pay such sums of money so to be assessed as aforesaid, then the said lieutenants, &c. or the major part of them assembled, not being less than three, for every such offence, by warrant under the hands and seals of the commissioners then assembled, or the major part of them, not being less than three, of which the governor, or one of the deputy-lieutenants shall be always one, may levy such sums of money by distress and sale of the goods of the offender, rendering the overplus to the party so distrained, all necessary charges in levying thereof being first deducted, to be applied to the use of such troop or company whereunto the offender did belong, in such manner as the said lieutenants, &c. and commissioners of array, or the major part of them shall direct.

5. The lieutenants, &c. and commissioners of array, or the major part of them, may appoint treasurers or clerks for receiving and paying all money levied by virtue of this act, for the use of the militia, who shall give sufficient security before the lieutenants, &c. to account for all such sums of money as they shall receive or disburse, and shall every six months give their accounts in writing upon oath to the lieutenants, &c. who may administer the same.

(2) And the said accounts shall be forthwith certified to the chief governor and privy council, and a duplicate thereof shall be certified to the justices of peace at the next general quarter-sessions, and the treasurer or clerk shall be paid such gratuity by the said lieutenants, &c. as they shall think fit, not exceeding 6*d. per* pound for all such sums of money as they shall receive and disburse.

V. Seizing horses and arms.

1. By the act 2 *G. 1. c. 9.* It shall be lawful for the chief governor and council, when it is needful, by proclamation to command all civil officers to seize any horses, &c. belonging to any papist or person refusing to take the oath of abjuration, fit to mount an horseman or dragoon in the militia, except breeding mares, stallions, and horses under four years old, and the same to detain for ten days.

(2) During

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(2) During which time it shall be lawful for any person serving in the militia to tender and pay 5*l.* to such person seizing or having such horse in his custody, to be paid over to the former owner, deducting thereout the charge of seizing and keeping such horse, and on payment of the said sum the property of such horse shall vest in such person serving in the militia; but if no such sum shall be offered within the time aforesaid, such horse shall be returned to the owner, paying for the seizing and keeping the same.

2. Upon proof made on oath before any justice of peace where such papist or non-juring person resides, that any papist or nonjuror had at the time such proclamation issued, or a month before, in his actual possession, any horses, mares, or geldings fit to mount an horseman or dragoon in the militia, or any swords, bayonets, fire, or other arms, such papist or nonjuror, shall on demand made by any civil magistrate, or by any field officer or captain of horse or dragoons in the militia, deliver the same to the person demanding, or his order, within the district wherein such papist or nonjuror liveth.

(2) And if such person shall refuse or neglect to deliver the said horses, &c. or arms within three days after such proof and demand, at such place as by the person demanding the same shall be appointed within the said county, unless the same were before the time of the information given or sold without fraud, then it shall be lawful for such justice to issue his warrant for apprehending such person so refusing, in case he shall refuse to pay 10*l.* for such horse, &c. or arms not delivered as aforesaid, and him to commit to the county gaol till payment of the said sum, which shall go one half to the informer, and the other half to the use of the militia of the district where the offender dwells.

VI. Punishment for disobedience or embezzlement.

1. By the act 2 G. 1. c. 9. s. 5. The said lieutenants, &c. or the chief officers upon the place may imprison all mutineers as well officers as private men, or those who do not do their duty at the day of their musters and training, and other the aforesaid service, and may inflict for punishment for every such offence any pecuniary mulct, not exceeding 5*s.* *per diem*, or the penalty of imprisonment not exceeding one calendar month.

2. If any person to be arrayed and armed, shall detain or wilfully embezzel the horse, ammunition, arms, furniture, or any cloaths, with which he shall be intrusted for the service of the militia, it shall be lawful for the lieutenants, governors, and commissioners of array to imprison him till satisfaction made for the same.

VII. Stores for preserving militia-arms.

1. By the act 2 G. 1. c. 9. It shall be lawful for the grand jury of every county, or county of a city or town, to hire a house or rooms in the county town, or such places where there is a barrack, as the grand jury shall present

present, which shall contain racks and other conveniencies sufficient for safe keeping of arms, ammunition and accoutrements.

(2) And it shall be lawful for the grand jury of every county, &c. to raise by presentment at the assizes, and in the county and county of the city of *Dublin*, by presentment of the grand jury at the sessions respectively, such annual sum not exceeding ten pounds for the hiring the said house or rooms, and also to present a sum not exceeding ten pounds for fitting up the said house or rooms with conveniencies for the said arms.

2. The lord lieutenant or chief governors shall appoint for each county, or county of a city or town where such house or rooms shall be so hired, a proper storekeeper or armourer, who shall be obliged to keep the said arms, ammunition and accoutrements in good order.

(2.) And the grand jury of each county shall raise by presentment annually, a sum not exceeding twenty pounds, or three pence for every firelock, bayonet and broad sword for defraying the necessary expence thereof, and for the salary of such storekeeper.

3. The governors of each county or county of a city or town, or their deputies or commissioners of array where there is no governor, or any of them, shall be empowered to enter into the said stores and view the arms, ammunition, and accoutrements lodged therein.

(2) And the grand jury of the several counties shall twice in every year at the time of the assizes, and in the county and the county of the city of *Dublin* at their quarter-sessions respectively, visit the said stores.

(3) And in case it shall appear to them, that the said arms, ammunition, or accoutrements, or any considerable part of them, have through neglect or design of the said store-keeper, been suffered to go out of proper order, or in case of other misbehaviour in his office appearing to them, the said grand jury shall be empowered to remove the said store-keeper by presentment from his office.

(4) And the lord lieutenant or chief governors shall appoint another person qualified as aforesaid to serve in the room of such store keeper so removed.

4. In case there be any of his majesty's standing forces quartered in the places where arms, ammunition, or accoutrements for the use of the militia are kept, the commanding officer of the forces then in the place, shall appoint a sufficient guard out of the standing forces for the security of the said arms, &c.

(2) But if none of his majesty's standing forces are quartered in the said town, the governors or their deputies, and commissioners of array of the said county, shall appoint a sufficient guard for that purpose, out of the militia of the said town and neighbourhood, which guard shall be paid so long as they remain in that service after the same rate his majesty's standing forces are paid.

(3) And the grand juries of the several counties shall raise by presentment annually at the assizes, and in the county and county of the city of *Dublin* at their quarter-sessions respectively, in the same manner that all publick money is by them raised, a sum sufficient for the pay of the men appointed out of the militia, for the guard of the said arms, &c.

A Warrant against a papist, for refusing to deliver a horse, upon demand.

To the constable of —, and to the keeper of his majesty's gaol, at K. in the county of —

County of } **W**HEREAS there lately issued a proclamation, from the
— to wit. } chief governors and council of this kingdom, commanding and authorizing all sheriffs, justices of the peace, (and so forth) to seize and secure any horses, mares, or geldings, belonging to any papist, or person refusing to take the oath of abjuration, fit to mount an horseman, or dragoon, in the militia: and whereas it hath been duly proved before me, that A. B. of the parish of C. in the county aforesaid gent. being a papist, [or, person refusing to take the oath of abjuration] had, at the time the said proclamation issued one horse [or, mare, or gelding] fit for mounting an horseman, or dragoon, in the militia, and also had arms, and that the same were duly demanded by C. D. of the parish aforesaid, captain of horse, in the militia of the said county, and that the said A. B. hath, for the space of three days, refused to deliver the said horse and arms, or to prove that the same were (before such demand made) given, or sold, without fraud: these are therefore, in his Majesty's name, to charge and command you forthwith to apprehend the said A. B. and (in case he shall refuse to pay unto you ten pounds for such horse, [mare, or, gelding] and arms, not delivered, as aforesaid) to convey him safely to the gaol aforesaid, and deliver him to the keeper thereof, together with this precept: hereby also commanding you, the said keeper, to receive the said A. B. into your custody, and him safely there to keep, without bail, till payment of the said sum; and if the same shall be paid to you, or either of you, then you are forthwith to pay one moiety thereof to C. D. of the parish of C. aforesaid, who informed me of the said offence; and the other moiety to E. F. of the said parish, esquire, for the use of the militia of the district where the said A. B. did then dwell: hereof fail not. Given —

Miller.

BY an antient ordinance, *Hawk. Stat. V. i. p. 181.* The toll of a mill shall be taken according to the custom of the land, and according to the strength of the water-course, either to the twentieth or four and twentieth corn.

And yet in some places the millers do claim and take the sixteenth part: and where the custom hath been so used time out of mind, perhaps it may be good and warrantable. *Dalt. c. 112.*

And Mr. Dalton says, the miller ought to take but one quart for grinding of one bushel of hard corn, but if he fetch and carry back the grist to the owner, he may take two quarts of hard corn; and this hard corn is intended of wheat, rye, messin (which is wheat and rye mixed). And for malt, the miller shall take but half so much toll as he taketh for hard corn, that

Militia.

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that is one pint in the bushel, for that malt is more easily ground than wheat or rye: but if the miller do fetch to his mill, and carry back the malt to the owner's house, then the miller also shall have double toll.

Dalt. c. 112.

But, by *Holt Ch. J.* the toll of a mill must be regulated by custom; and if the miller takes more than the custom warrants, it is extortion: but if it is a new mill, there the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties. *L. Raym 149.*

In some places, the tenants are bound to have their corn ground at the lord's mill. As in the case of *Hix and Gardener, H. 11 J.* In an action on the case for erecting a mill, the lord declared upon a custom for all the inhabitants to grind at his mill, and that the defendant had built a mill there contrary to the custom; and this was adjudged a good custom: and suit to a mill may be by reason of tenure or service, and also by custom, and so may well bind strangers. *2 Bulst. 195.*

And a new erected house within the precincts is within the custom of mill-ture; and none may grind elsewhere, but in case of excessive toll, or that the grist cannot be ground in convenient time. *Hardr. 177.*

16 G. 2. K. and Wood. The defendant, being a miller, was indicted for changing corn delivered to him to be ground, and giving bad corn instead of it. It was moved to quash it, because only a private cheat, and not of a publick nature. But it was answered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court was unanimous not to quash it. *Seff. Cas. V. 1. 217.*

Altho' every larceny implies a trespass, and a felonious taking of the thing stolen; yet it hath been resolved, that even those who have the possession of goods by the delivery of the party, as a miller who hath corn delivered to him to grind, may be guilty of felony by taking away part thereof with an intent to steal it. *1 Haw. 90.*

Millers are not to be common buyers of any corn, to sell the same again, either in corn or meal; but ought only to serve for the grinding of corn that shall be brought to their mills. *Dalt. c. 122.*

Mines.

1. **B**Y the act, *10 G. 1 c. 5.* Where proprietors of lands have set their lands in fee farm and for leases for lives renewable for ever, or for a long term for years with an exception of mines or minerals in such fee farms or leases, all persons to whom the rent upon such fee farms, or the immediate reversion in fee simple or fee tail expectant on such leases belong, shall have power to open, dig, and work all mines or minerals which shall be found upon the said lands, and to raise and carry away the ore thereof, or to demise the same for thirty one years. *f. 4.*

(2) And the persons aforesaid, and all persons to whom the said mines and minerals shall be demised as aforesaid, shall have free liberty to build such houses as shall be convenient for working the said mines, and to dig and

X x x

make

make turf for the use of the said houses where the same shall happen to be in bogs or mountains only, making to such persons as shall be intitled to the possession of the lands wherein such mines and minerals shall be dug for, wrought, or found, such reasonable allowance for the damage sustained upon account of digging such mines, and raising and carrying away the ore, or for the building such houses, or the digging such turf, as shall be agreed upon between the parties interested therein.

(3) And in case the said parties do not agree, then such damages shall be ascertained by a jury of twelve legal freeholders of the county upon their oaths in the presence of two justices of the peace for such county.

2. In case the said parties do not agree among themselves, any two neighbouring justices of the peace for such county are required to issue a precept in writing under their hands and seals, requiring the sheriff of such county to return four and twenty freeholders at such time and place as shall in such precept be appointed, due notice of which shall be given to both parties, out of which four and twenty freeholders so returned, twelve legal and indifferent men shall be sworn to try and ascertain the damages, and the allowance to be made for such damages.

(2) And the said two justices shall certify such finding or inquisition under their hands and seals into *the* king's bench, which shall be recorded in the said court, and the like process shall issue thereon as in case of a judgment upon a writ of inquiry of damages.

3. Provided that before the said twelve men so sworn shall make any return for the ascertaining of the said damages, six of them at least shall view the several places where the damages are alledged to be done.

4. It shall not be lawful for any persons in pursuance of this act, to open, search, dig for, or work, any mines or minerals in any spot of ground, whereon any house, backside, garden, orchard, or avenue, shall be, without the licence, or consent of the tenant or possessor thereof, and of all other persons who shall be seized of the immediate reversion and inheritance of the said lands, expectant on the leases made in fee simple or fee tail, first obtained in writing.

A precept to the sheriff to return a jury of twenty four freeholders.

By *A. B.* and *C. D.* Esquires, two of his majesty's justices of the peace, for the county of —

To *E. F.* esquire, high-sheriff of the said county.

PURSUANT to an act of parliament made in this kingdom, in the *tenth* year of the reign of his late Majesty King George the first, intituled, An act for the further encouragement of finding and working mines and minerals, within this kingdom, we do hereby require you to summon twenty-four freeholders of your county to appear before us, at *K.* in the said county, on the — day of — next, at ten of the clock in the forenoon, to view and

Mines.

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and ascertain the damages sustained by G. H. of K. aforesaid, occasioned by I. K.'s opening and working of a mine, in and upon the lands of L. in this county, whereof the said G. H. is tenant, and by carrying away the ore, and by building houses, for working of the said mine, and by digging and making turf for the said houses; and that you then return this precept, together with the names and additions of the said twenty-four freeholders: hereof fail not. Given under our hands and seals —

The inquisition and return of the jury.

County of } **A**N inquisition indented, taken at K. in the said county, on
—to wit. } the — day of this instant — before A. B. and
C. D. esquires, two of his majesty's justices of the peace, for the said county,
(by virtue of an act of parliament made in this kingdom, in the tenth year of
the reign of his late majesty king George the first, intituled, An act for the
further encouragement of finding and working mines and minerals within
this kingdom) upon the oaths of I. K. L. M. [so to the number of twelve]
good and lawful men of the said county, which jury, being sworn to enquire,
view, and ascertain what damages G. H. of K. aforesaid, sustained and
will sustain, by I. K.'s opening and working of a mine, in and upon the
lands of L. in the said county, (whereof the said G. H. is tenant) and by
the said I. K.'s carrying away ore, building of houses, for working of the
said mine, and by digging and making of turf, for the said houses, upon their
oaths, say, that they have enquired into and viewed the said damages, which
the said G. H. hath sustained, and will sustain, on the account aforesaid:
and do ascertain and appoint that the said I. K. his executors, administrators,
or assigns, shall pay or allow unto the said G. H. his executors, administra-
tors, or assigns, the sum of ten pounds a year for the said damages, to com-
mence from the — day of this instant — and to be paid or allowed quar-
terly, by four equal payments, or allowances, during the whole time that the
said mine and ore shall be working [or, as they shall return.] In witness
whereof, as well the said justices, as the said jury, have hereunto set their
hands and seals, the —

The justices certificate of the inquisition.

To the right honourable T. M. esquire, lord chief justice of his majesty's
court of King's Bench, in Ireland, and the rest of the judges of the
same court.

County of } **W**E A. B. and C. D. esquires, two of his majesty's jus-
—to wit. } tices of the peace, for the said county, do hereby certify,
that the annexed inquisition was taken in our presence. In witness whereof we
have hereto set our hands and seals, the — day of —

X x x 2

THIS

THIS word in its usual acceptation is applied to all those crimes and offences, for which the law has not provided a particular name; and they may be punished according to the degrees of the offence, by fine, or imprisonment, or both. *Barl.*

Mute.

THE whole learning relating to this title, will be comprehended in the explication of the statute of *Westminster* 1. c. 12. which is as follows: *Notorious felons, and which openly be of evil name, and will not put themselves in inquest of felonies that men shall charge them with before the justices at the king's suit, shall have strong and hard imprisonment, as they which refuse to stand to the common law of the land. But this is not to be understood of such prisoners as be taken of light suspicion.* 3 Ed. 1. c. 12.

Felons] This statute extendeth not to treason, which is the highest offence; nor to petit larceny, which is of all felonies the lowest: but if a man stand obstinately mute upon an arraignment of treason or petit larceny, he shall have the like judgment as if he had confessed the indictment. 2 *Inst.* 177. 2 *Haw.* 329.

This word *felons* extendeth as well to women, as to men. 2 *Inst.* 177.

Notorious, and openly of evil fame] Therefore no person shall be put to this punishment, unless the matter be evident or proveable, which it is the duty of the judge to look unto, and to examine the evidence which proves the prisoner guilty of the fact, before he proceed to the judgment of *pain fort & dure*. 2 *Inst.* 177. 2 *Haw.* 330.

And will not put themselves in inquests.] This is called standing mute. Now a man may stand mute two manner of ways:

First, when he stands mute *without speaking of any thing*; and then the court shall *ex officio* inquire by the oath of any 12 persons that happen to be present, whether he do so of malice, or by the act of god; and if it be found that it was by the act of god, then the judges of the court (who are always to be of counsel with the prisoner to give him law and justice) ought to inquire touching all those points which he might possibly plead for himself, as whether a felony were done, whether he be the same person that is indicted for it, whether he did it, and whether he hath any matter to allege for his discharge; and such inquiry shall be made, not by an inquest of office, but by a jury returned by the sheriff, in the same manner as if the defendant had actually pleaded; for since it is not his own fault that he did not so plead, there is no reason why his trial should be in a more loose and summary manner, or any way less regular or solemn, than if he had so pleaded. 2 *Inst.* 178. 2 *Haw.* 327, 328. 2 *H. H.* 317.

But what if all this be found against the prisoner, what shall be done? — Whether judgment of death shall be given against him, though he never pleaded, seems yet undetermined. 2 *H. H.* 317.

But

But after a man hath confessed himself guilty, or pleaded and put himself upon his country, he shall not afterwards be demeaned as one that stands mute, in respect of his subsequent silence; but the jury shall be charged and the trial shall proceed, and the like judgment shall be given as in common cases. 2 Haw. 327.

Also if the person become mute, and not by the act of god, as by cutting out his own tongue, he shall forthwith be put to his penance. 2 Inst. 178.

Another kind of mute is, when the prisoner can speak, and perhaps pleadeth not guilty, or pleadeth a plea in law, and *will not conclude to the inquest* according to this act, that is, to be tried by god and the country; then this act is sufficient warrant, if he cause be evident or probable, to put him to his penance: but if he demur in law, and it be adjudged against him, he shall have judgment to be hanged; and tho' by his demurrer he refuse to put himself upon the inquest according to the letter of this act, yet forasmuch as he is out of the reason of this act, for that he refuseth not the trial of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he shall not be put to his penance, but have judgment to be hanged, and not have *pain fort & dure*. 2 Inst. 178.

At the king's suit] This act speaketh only of indictments at the suit of the king; but the judgment of *pain fort & dure* was at the common law, both in indictments and appeals. 2 Inst. 177.

Shall have strong and hard imprisonment] *Soient mises en la prison fort & dure*: The judgment in this case is, that the man or woman shall be remanded to the prison, and laid there in some low and dark room, where they shall lie naked on the bare earth without any litter, rushes, or other cloathing, and without any garment about them, but something to cover their privy parts, and that they shall lie upon their backs, their heads uncovered and their feet, and one arm shall be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the same manner shall be done with their legs, and there shall be laid upon their bodies iron and stone, so much as they may bear and more, and the next day following they shall have three morsels of barley bread without any drink, and the second day they shall drink thrice of the water that is next to the house of the prison (except running water) without any bread, and this shall be their diet until they be dead. So as upon the matter they shall die three manner of ways, by weight, by famine, and by cold. And the reason of this terrible judgment is because they *refuse to stand to the common law of the land*. 2 Inst. 178, 179.

Which punishment being so severe, lord Hale advises, that it be not given too hastily, but that the prisoner be not only thrice admonished, but also have some convenient respite, as until the afternoon, to bethink himself, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon; and that the judgment it self be distinctly read to him, that he may know his danger before his final refusal, with due admonition not to destroy himself. 2 H. H. 320.

And

Mute.

And it is said to be the practice of *Newgate* sessions, where a prisoner refuses to plead, to endeavour to compel him to do it, by tying his thumbs together with whip-cord, and drawing them together by the strength of two men to give him a taste of the pain to be endured, if he will not comply.

2 *Haw.* 331.

And tho' judgment be given of *pain fort & dure*, yet if the offence laid in the indictment be within clergy, his clergy shall be allowed him; and tho' in strictness of law the prisoner ought to pray it, yet it is the duty of the judge to allow it, tho' not prayed, and that as well after judgment pronounced as before. 2 *H. H.* 320, 321.

And as to the case how far he is intitled to his clergy, it is enacted by the 3 *W. c.* 9. that if any person be indicted of any offence, for which by virtue of that or any former statute he is excluded from the benefit of clergy, if he had been convicted by verdict or confession; if he stand mute, or will not answer directly to the felony, or shall challenge peremptorily above 20 of the jury, he shall not be admitted to the benefit of clergy. *f.* 2.

In which expression [by virtue of any former statute] offences excluded from the benefit of clergy by subsequent statutes seem not to be comprehended; and consequently persons standing mute on an indictment upon any such subsequent statute, shall have their clergy, if it is not otherwise specially provided by such statute. 2 *Haw.* 332.

And as to the other consequences of standing mute, it is observable, that where a person standing mute is adjudged to his penance, and thereby prevents that attainder which otherwise he might have incurred, he *forfeits his chattels* only, and not his *lands*; and for this reason some have endured this punishment. 2 *Haw.* 331.

It doth not appear that the prosecutor of an indictment for felony, where the defendant standeth mute, is intitled to the restitution of his goods, either by the common law or by any statute. 2 *Haw.* 332.

But this is not to be understood of such prisoners as shall be taken on light suspicion] But if they obstinately stand mute, it seemeth that they may be severely fined and imprisoned for the contempt. 2 *Haw.* 330.

Nuisance.

I. *What it is.*

II. *How it may be removed.*

III. *How punished.*

I. *What it is.*

A Common nuisance seems to be, an offence against the publick, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. 1 *Haw.* 197.

Annoy-

Annoyances to the prejudice of particular persons, are not punishable by a publick prosecution as common nuisances, but are left to be redressed by the private actions of the parties aggrieved by them. 1 *Haw.* 197.

Where note a diversity between a *private* and a *publick* nuisance: If it is a *private* nuisance, he shall have his action upon his case, and recover his damages; but if it is a *publick* nuisance, he shall not have an action upon his case, and this the law hath provided for avoiding of multiplicity of suits, for if any one might have an action, all men might have the like; but the law for this common nuisance hath provided an apt remedy, by presentment or indictment at the suit of the king, in the behalf of all his subjects; unless any man hath a particular damage, as if he and his horse fall into a ditch made across a highway, whereby he received hurt and loss, there for this special damage which is not common to others. he shall have an action upon his case. 1 *Inst.* 56.

And from hence it clearly follows, that no indictment for a nuisance can be good, which lays it to the damage of private persons only: as where it accuses a man of furcharging such a common; or of inclosing such a piece of ground, wherein the inhabitants of such a town have a right of common, to the nuisance of all the inhabitants of such a town; or of disturbing a water-course running to such a mill, to the damage of such a person and his tenants, without saying of *all the liege subjects of the king.* 1 *Haw.* 197.

Yet it hath been said, that an indictment of a *common scold* is good, although it conclude to the common nuisance of *divers*, instead of *all* the king's subjects; perhaps for this reason (says Mr. *Hawkins*) because a common scold cannot but be a common nuisance. 1 *Haw.* 198.

And if the law be so in this case, why should not an indictment setting forth a nuisance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude to the nuisance of *divers*, without saying *all* the king's subjects? And perhaps the authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way wherein the nuisance was alledged, were a highway, or only a private way; and therefore that it shall be intended from the conclusion of the indictment, that it was a private way. 1 *Haw.* 198.

There is no doubt, but that common *bawdy houses* are indictable as common nuisances; and it hath been said, that all common *stages for rope dancers*, and also all common *gaming houses*, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw great numbers of disorderly persons. 1 *Haw.* 198.

Also it hath been holden, that a common *play house* may be a nuisance, if it draw together such a number of coaches or people, as prove generally inconvenient to the places adjacent. 1 *Haw.* 198.

Erecting a *shed* so near a man's house, that it *stops up his lights* is not a nuisance for which an action will lie, unless the house is an antient house, and the lights antient lights. 2 *Salk.* 459.

Also stopping a *prospect* is not a common nuisance. 3 *Salk.* 247.

A gate erected in a highway, where none had been before, is a common nuisance. 1 *Haw.* 199.

It

Nuisance.

It hath been holden, that it is no common nuisance to *make candles* in a town, because the needfulness of them shall dispence with the noisomness of the smell; but the reasonableness of this opinion seems justly to be questionable, because whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town: and surely the trade of a *brewer* is as necessary as that of a chandler; and yet it seems to be agreed, that a brewhouse erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance: and so in like case may a *glass house*, or a *swine yard*. 1 Haw. 199.

A person was indicted for making great noises in the night with a *speaking trumpet*, to the disturbance of the neighbourhood; and it was held by the court to be a nuisance. T. 12 G. K. and Smith. Str. 704.

But it hath been resolved, that neither an old, nor a new *dove-cote* is a common nuisance; but perhaps if a tenant hath erected one without licence of the lord of the manor, the lord may have an action on his case against him. 1 Haw. 198.

A *monster* shewn for money is a misdemeanor. 2 Cha. Ga. 110. T. 34. C. 2. *Harring* and *Warland*. It was a monstrous child, that died, and was embalmed to be kept for shew; but was ordered by the lord chancellor to be buried.

If a man has a *dog* that kills sheep, this is not a publick nuisance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of such quality, he shall not be punished for this killing: and in an action upon the case for such killing, the plaintiff shall be required to prove in evidence, that the dog had used to kill sheep. Dyer 25. Het. 171.

And in order to maintain an action for biting by the defendant's dog, it must be proved also that he knew his dog to be used to bite; but one instance is sufficient in that case. 12 Mod. 555.

And if a man keeps a dog accustomed to bite *sheep*, and he knows it, and notwithstanding he keeps the dog still, and afterwards the dog bites a *horse*; this shall be actionable, altho' he had been known before to bite sheep only: because the owner, after notice of the first mischief, ought to have destroyed or hindered him from doing any more hurt. L. Raym. 110.

If a man has an unruly *horse* in his stable, and leaves open the stable door, whereby the horse gets forth and doth mischief, an action lies against the master. 1 Fent. 295.

In the case of *Buxendin* and *Sharp*, E. 8 W. The plaintiff declared, that the defendant kept a *bull*, that used to run at men, but did not say that the defendant knew of this quality; it was adjudged, that an action did not lie, unless it did appear that the master knew of this quality. 2 Salk. 662.

There is a difference between beasts that are *feræ naturæ*, as lions and tigers, which a man must always keep up at his peril; and beasts that are *mansuetæ naturæ*, and break thro' the tameness of their nature, such as oxen and horses: In the latter case, an action lies, if the owner has had notice of the quality of the beast; but in the former case, an action lies without such notice. L. Raym. 1583.

But after such wild beasts have escaped from their keeper, so as to regain their natural liberty; in such case, he that kept them before, shall not answer

swer for the damage they shall commit after he hath lost them, and they have resumed their wild nature. 1 Vent. 295.

A mastiff, going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his majesty's subject's, seemeth to be a common nuisance, and consequently the owner may be indicted for suffering him so to go at large.

II. How it may be removed.

It seemeth to be certain, that any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house erected in a highway, or the like; for if one whose estate is or may be prejudiced by a private nuisance actually erected, as a house hanging over his ground, or stopping his lights, may justify the entering into another's ground, and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate, it cannot but follow *a fortiori*, that any one may lawfully destroy a common nuisance: And as the law is now holden, it seems that in a plea, justifying the removal of the nuisance, a man need not shew that he did as little damage as might be. 1 Haw. 199.

But although he may remove the nuisance, yet he cannot remove the materials, or convert them to his own use. Dalt. c. 50.

III. How punished.

It is said, that a common scold is punishable by being put into the cucking stool. 1 Haw. 200.

Note; *cuck* or *guck* in the Saxon tongue (according to lord Coke) signifieth to scold or brawl; taken from the bird *cuckow* or *guckhaw*: and *ing* in that language signifieth water; because a scolding woman was for her punishment fowled in the water. 3 Inst. 219. The common people in the northern parts of England, amongst whom the greatest remains of the ancient Saxon are to be found, pronounce it *ducking stool*; which perhaps may have sprung from the *Belgic* or *Teutonick* *ducken*, to dive under water; from whence also probably we denominate our *duck* the water fowl: or rather, it is more agreeable to the analogy and progression of languages, to assert, that the substantive *duck* is the original, and the verb made from thence; as much as to say, that to *duck* is to do as that fowl does.

And she may be convicted, without setting forth the particulars in the indictment. 2 Haw. 227.

Nevertheless, the offence must be set forth with convenient certainty; and the indictment must conclude not only against the peace, but to the common nuisance of divers of his majesty's liege subjects. As in the case of K. and Margaret Cooper, H. 19 G. 2. She was convicted on an indictment, for being a common and turbulent brawler, and sower of discord amongst her quiet and honest neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes, amongst his majesty's liege people, against the peace, &c. It was moved in arrest of judgment, that the charge was too general, and did not amount to being either a barrator or common scold,

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which

which are the only instances in which a general charge will be sufficient. It was likewise objected, that if the words did amount to a description of a scold, yet it should be laid to be to the common nuisance of her neighbours, for every degree of scolding is not indictable. And the court was of opinion, that the judgment ought to be arrested on both exceptions; for none of the words here used are the technical words, and it must be laid to be to the common nuisance. *Str.* 1246.

There is no doubt, but that whoever is convicted of another nuisance, may be fined and imprisoned; and it is said, that one convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs: and it seemeth to be reasonable, that those who are convicted of any other common nuisance, should also have the like judgment. *1 Haw.* 200. *Str.* 686.

And the defendant shall not be allowed to make any objections against the indictment, until he hath pleaded to it. *Dalt. c.* 66.

And the court never admits a person convicted of a nuisance, to a small fine, until proof is made of the nuisance being removed. *Dalt. c.* 66.

A master is indictable for a nuisance done by his servant. *L. Raym.* 264.

All common nuisances are indictable not only at the sessions, but also in the torn and leet. *2 Haw.* 67.

An act of general pardon only discharges the fine, but not the abatement of the nuisance. *2 Salk.* 458.

There are many offences by particular statutes declared to be common nuisances, which are treated of under their respective titles.

General indictment for a nuisance.

THE jurors for our lord the king upon their oaths present, That A. O. late of—in the county of—yeoman, on the—day of—in the—year of the reign of—and on divers other days and times, as well before as afterwards, with force and arms, at—in the said county, [here set forth the nuisance] and the same (nuisance) so as aforesaid done, doth yet continue and suffer to remain; to the common nuisance of all the lieges and subjects of our said lord the king, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

And the jury find, that the said A. O. did, with force and arms, at—in the said county, [here set forth the nuisance] and the same (nuisance) so as aforesaid done, doth yet continue and suffer to remain; to the common nuisance of all the lieges and subjects of our said lord the king, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

1. Of

I. Of oaths in general.

II. The common forms of oaths.

III. Quakers oaths.

IV. Oaths of infidels.

I. Of oaths in general.

OATH is a corruption of the *Saxon* word *eoth*. 3 *Inst.* 165. Oath.
 2. It is called a corporal oath, because the person lays his hand upon some part of the scriptures when he takes it. 3 *Inst.* 165. Corporal oath.

3. If the oath be taken on the common prayer book, which hath the epistles and gospels, it is good enough, and perjury upon the statute may be assigned upon this oath. 2 *Keb.* 314. Oath taken on the common prayer book.

4. The words, *So help me God*, in the common form of an oath, perhaps may have been first used in the very ancient manner of trial by battle in this kingdom, or at least are delivered with a peculiar emphasis in that solemnity; wherein the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears to this effect, *Hear this, thou who callest thy self John by the name of baptism, whom I hold by the hand, that falsely upon me thou hast lied; and for this thou liest, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father W. by name—So help me God—*(and then he kisses the book, and says) *and this I will defend against thee by my body, as this court shall award.* And so the appellant is sworn in like manner. So help me God.

[Where we may observe also the genuine foundation, as it seemeth, of the *lie* being esteemed still so great an affront above all others, as, whenever it is pronounced, to cause an immediate affray and bloodshed.]

5. No ancient oath can be altered, or new oath imposed, without an act of parliament; nor can any oath be administered by any, that have not allowance by the common law time out of mind, or by an act of parliament. 2 *Inst.* 479. 3 *Inst.* 165. Power of administering an oath.

And this is the reason why generally there is a clause in the statutes, giving power to the justices to this or the like effect [*which oath such justice is hereby empowered to administer;*] tho' it seems to be clear, that if an act empowers a justice, in a summary way to convict an offender by the oath of a witness, it doth (without any more) of necessity give him power to administer the oath to that witness; and that it is sufficiently implied in the words, and necessarily included in the power. For when the law grants any thing, that also is granted, without which the thing it self cannot be. 12 *Co.* 130. 131.

6. Where an oath is administered by a person that hath lawful authority to tender the same, and it be afterwards broken, yet if it be not in a judicial proceeding, it is no perjury, nor punishable by the common law. 3 *Inst.* 166. Perjury.

Therefore if one call another a *perjured* man, he may have an action on the case, because it shall be intended to be contrary to his oath in a judicial proceeding.

proceeding; but for calling one a *forsworn* man, no action lies; because the forswearing may be extrajudicial, and consequently no perjury in law. 3
Inst. 166.

Of the oath of
allegiance.

7. Every layman, above the age of 12 years, was anciently obliged to take the oath of allegiance at the tourn or leet, and it was a high contempt to refuse it. 1 *Inst.* 68.

But the clergy were not obliged to take the oath of allegiance till the reformation, any further than doing homage to the king for the lands held of him in right of the church. 1 *H. H.* 71, 72.

Lord *Hale*, speaking of the ancient oath of allegiance, which continued above 600 years, says, that therein the prudence of the common law is observable, that it was short and plain, not intangled with long and intricate clauses or declarations, but that the sense of it was obvious to the most common understanding, and yet withal comprehensive of the whole duty of a subject to his prince. 1 *H. H.* 63. And from this the present form of the oath of allegiance hath not much varied.

Of the oath of
supremacy.

8. The oath of supremacy came in, upon abolishing the papal authority at the reformation. *Read.* Oath.

Of the oath of
abjuration.

9. The oath of abjuration came in after the revolution; received some alterations in the first year of queen *Anne*: and again in the first year of king *George* the first. *N. B.* Both these statutes extend to *Ireland*.

Perhaps it might be wished, that it were made more applicable to lord *Hale's* rule, in being more short and plain; there being in it several hard words, which probably many who take it do not well understand; and there being an act of parliament therein referred to, which perhaps not one in fifty who take it have consulted.

Summoning
persons to take
the oaths.

10. Two justices may summon by writing under hand and seal, any person whom they shall suspect to be dangerous or disaffected to the government, to appear before them, at a certain day and time therein to be appointed, to take the oaths of allegiance, supremacy, and abjuration; and if such person neglects or refuses to appear, then on due proof made on oath of the summons having been served on such person, or left at his dwelling house, or usual place of abode, with one of the family there, they shall certify the same to the next sessions, there to be recorded by the clerk of the peace. And if such person shall neglect or refuse to appear and take the oaths at the said sessions (the name of such person being publicly read at the first meeting of the said sessions), then such person shall be esteemed and adjudged a popish recusant convict: and the same shall be thence certified by the clerk of the peace, into the chancery or king's bench, to be there recorded. *Br. ff.* 1 *G. ff.* 2. c. 13. s. 10, 11.

Whom they shall suspect] It seemeth that a bare suspicion is not sufficient, but there should be some good cause of suspicion, and that the cause of suspicion is traversable. *Read.* Oath.

Refuse—to take the oaths] A person cannot be said to refuse the oaths, unless they be read to him, or offered to be read. *Read.* Oath.

II. The common forms of oaths.

1. The oath of allegiance, by the Br. st. 1 G. st. 2. c. 13.

I A. B. do sincerely promise and swear, that I will be faithful, and bear true allegiance to his majesty king George: So help me God.

Oath of allegiance.

2. The oath of supremacy, by the Br. st. 1 G. st. 2. c. 13.

I A. B. do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm: So help me God.

Oath of supremacy.

3. The oath of abjuration, by the Br. st. 1 G. st. 2. c. 13.

I A. B. do truly and sincerely acknowledge, profess, testify, and declare in my conscience, before God and the world, that our sovereign lord king George is lawful and rightful king of this realm, and all other his majesty's dominions thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretended to be prince of Wales, during the life of the late king James, and since his decease, pretending to be, and taking upon himself, the style and title of king of England, by the name of James the third, or of Scotland, by the name of James the eighth, or the style and title of king of Great Britain, hath not any right or title whatsoever, to the crown of this realm, or any other the dominions thereto belonging: And I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear that I will bear faith and true allegiance to his majesty king George, and him will defend, to the utmost of my power, against all traiterous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my utmost endeavour, to disclose and make known to his majesty, and his successors, all treasons and traiterous conspiracies which I shall know to be against him, or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain and defend the succession of the crown against him the said James, and all other persons whatsoever; which succession, by an act, intitled, An act for the further limitation of the crown, and better securing the rights and liberties of the subject, is and stands limited to the princess Sophia, electress and dutchess dowager of Hanover, and the heirs of her body being protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a christian: So help me God.

Oath of abjuration.

The oath of abjuration by this act appointed shall be the oath to be taken in Ireland.

5. The declaration against popery; by the 30 C. 2. st. 2. c. 1.

I A. B. do solemnly and sincerely, in the presence of God, profess, testify and declare, that I do believe, that in the sacrament of the lord's supper there is not any

Declaration against popery.

any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever: And that the invocation, or adoration of the virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous: And I do solemnly in the presence of God, profess, testify and declare, That I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null or void from the beginning.

III. Quakers oaths.

Affirmation allowed.

1. In all cases wherein by any act of parliament an oath shall be allowed or required, the solemn affirmation of quakers shall be allowed instead of such oath; and that, altho' no express provision be made for that purpose in such act. 19 G. 2. c. 18.

Perjury incurred by false affirmation.

2. And if any person shall be lawfully convicted of wilful, false, and corrupt affirming or declaring any matter or thing, which if sworn in the usual form would have amounted to wilful and corrupt perjury, he shall suffer as in cases of perjury. 19 G. 2. c. 18.

Affirmation not allowed in criminal matters.

3. But no quaker shall by virtue hereof be qualified or permitted to give evidence in any criminal cause, or serve on any juries, or bear any office or place of profit in the government. 19 G. 2. c. 18.

In any criminal cause] By which words it seemeth, that a quaker shall not have sureties of the peace or good behaviour granted to him, or have a warrant to search for stolen goods, or sue the hundred for damages in case of robbery, and the like, upon his bare affirmation; but that in all such cases, an oath is first necessary to be made.

Thus, *T. 4 G. 2. K. and Wych.* It was denied to read a quaker's affirmation, on a motion for an information for a misdemeanor. *Str. 872.*

T. 7 G. Robins and Sayward. By the court, We cannot ground an attachment, for non-performance of an award, on the affirmation of a quaker; for though it be in a suit between party and party, yet it is a criminal prosecution within the proviso of the statute. *Str. 441.*

H. 3 G. 2. Castell, widow, against Bambridge and Corbet. In an appeal of murder, a quaker was called for a witness, and it was insisted that this is a civil suit between party and party, and not between the king and the party, and therefore his affirmation ought to be taken. But *Raymond Ch. J.* said, it was to this purpose a criminal proceeding, and therefore he could not be a witness. *Str. 856.*

Oaths.

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4. The quakers solemn affirmation, instead of an oath, as finally settled by the 8 G. c. 6. is as follows; viz. General form of affirmation.
"I A. B. do solemnly, sincerely, and truly declare and affirm."

IV. Oaths of infidels.

1. A Jew is to be sworn on the old testament, and perjury upon the statute may be assigned upon this oath. 2 Keb. 314.

H. 2 G. 2. Gomez Serra and Munex. Upon error in debt upon a bond, the bail being both Jews, were suffered to put on their hats while they took the oath. Str. 821.

When Jews take the oath of abjuration, the words [on the true faith of a christian] shall be omitted. 10 G. c. 4. s. 18.

2. At the council, Dec. 9, 1738. Present the two chief justices. On a Mahometan complaint of Jacob Fachina against general Sabine, as governor of Gibraltar; Alderaman Ben Monso, a Moor, was produced as a witness, and sworn upon the Koran. Str. 1104.

So in the case of Omichund against Barker, in the court of chancery, a Mahometan was sworn upon the Koran. 2 Eq. Caf. Abr. 397.

Concerning the taking of oaths for qualifying for offices, see title **Office.**

And concerning the offences of profane cursing and swearing, see title **Swearing.**

Office.

I. Qualification for offices in general.

II. Penalties for neglecting to qualify.

I. Qualification for offices in general.

1. **B**Y the En. st. 3 W. 3. c. 2. (for the abrogating the oath of supremacy in Ireland, &c. No person in Ireland, shall be obliged to take the oath of supremacy, by virtue of the statute made in Ireland, 1 Eliz. cap. 1. restoring to the crown its ancient jurisdiction, &c. but that statute, and every other statute, for so much only as concerns the said oath, are hereby repealed.

2. The oaths appointed to be taken by this act, shall be taken by the persons required by the said act, or any other statute made in Ireland, to take the said abrogated oath. s. 2.

3. And all persons that shall be admitted into any office or employment, ecclesiastical, or civil, or come into any capacity, in respect whereof they should have been obliged to take the said abrogated oath, shall take the said oaths, and make and subscribe the declaration, in such manner as they ought to have taken the said former oath. s. 3.

Note,

Note, the forms of the abovesaid oaths and declarations, are inserted in the title *Oaths*.

4. And by the *En. st. 1 An. st. 2. c. 17. s. 4.* Every person that shall bear any office military or civil, or shall receive any pay or wages by reason of any grant from her Majesty, or shall have command or place of trust under her Majesty, or by authority derived from her in *Ireland*, and all ecclesiastical persons, and master or fellow of the college of *Dublin*, and all persons teaching pupils, and all schoolmasters and ushers, and all preachers of separate congregations, and every person that shall act as a serjeant at law, counsellor, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, practising as such in any court in *Ireland*, shall take the oath of abjuration, at the same time that they take the oaths and make the declaration appointed by *3 Will. & Mar. cap. 2.*

5. And moreover by the *2 An. c. 6.* All persons that shall be admitted into any office civil or military, or shall receive any pay, salary, fee or wages, belonging to any office or place of trust, by any patent or grant from her majesty, or shall have command or place of trust under her majesty, or any of her predecessors or successors, or by their authority, or by authority derived from them within *Ireland*, shall in the court of chancery, queen's bench, common pleas, or court of exchequer, in open court between the hours of nine of the clock and twelve in the forenoon, take the several oaths, and publickly make and repeat the declaration appointed to be taken, made, or subscribed within this kingdom, by an act of parliament made in *England* in the third year of king *William* and queen *Mary*, for the abrogating the oath of supremacy in *Ireland*, and appointing other oaths, and also shall at the same time take the oath of abjuration appointed to be taken by an act of parliament made in *England*, in the first year of her present majesty's reign, *cap. 17.* unto which oaths and declaration every person so taking the same, shall subscribe his name or make his mark. *s. 18.*

Any office civil or military] This seemeth evidently not to extend to ecclesiastical offices; and it may well be taken for granted, that clergymen need not to make such proof of their conformity to the church of *England*. But, by the following statute, they are to take the oaths as other persons qualifying for offices.

6. And every such person to be admitted as aforesaid, not having taken the said oaths in one of the said courts, and subscribed the same, and the said declaration as aforesaid, shall in the next term, or at the general quarter-sessions for that county or place where they shall reside, next after their admittance into any of the said offices or employments, after such their admittance take the said several oaths, and make and repeat the said declaration, and subscribe his name or make his mark under the said oaths and declaration in one of the said courts as aforesaid, between the hours mentioned in this act, and no other. *s. 18. § 2.*

7. But by the *1 G. 2. c. 2. s. 3.* All persons who shall take and subscribe the oaths, and make, repeat, and subscribe the declaration, in such manner and in such places as by the act *2 Ann. cap. 6.* to prevent the further growth of popery, are directed, in the same term, or at the same quarter-sessions during which they shall be admitted to such office or employment, shall be adjudged to have taken and subscribed the said oaths, and made, repeated, and

and subscribed the said declaration as effectually as if they had taken and subscribed the said oaths, and made, repeated, and subscribed the said declaration in the term, or at the quarter-sessions next after such their admittance into such office or employment.

8. And by the said act 2 Ann. c. 6. Every such person so to be admitted, shall also receive the sacrament of the LORD's supper, according to the usage of the church of *Ireland*, within three months after their admittance in, or receiving their authority and employments, in some parish church upon the LORD's day immediately after divine service and sermon.

f. 18. § 3.

9. And every of the said respective persons touching whom the said several provisions are here before made in the respective court where he or she takes the said oaths, shall first deliver a certificate of such his or her receiving the sacrament as aforesaid, under the hands of the respective minister and churchwardens, and shall then make proof of the truth thereof by two credible witnesses upon oath, all which shall be inquired of, and put upon record in the respective courts. f. 18. § 4.

10. But this shall not extend to the office of any high constable, petty constable, tithingman, headborough, overseer of the poor, churchwarden, surveyor of the highways, or any like inferior civil office, or to any office of forester, or keeper of any park, chase, warren, or game, or of bailiff of any manor or lands, or to any like private offices. f. 23.

II. Penalties on officers neglecting to qualify.

1. By the 2 Ann. c. 6. f. 19. Every person who shall be admitted into any office civil or military, who shall refuse or neglect to take the said oaths and sacrament, and to deliver such a certificate of his receiving the sacrament, or to subscribe the said declaration in one of the said courts and places, and at the respective times aforesaid, shall be *ipso facto* adjudged incapable to enjoy the said offices and employments, or any profit or advantage appertaining to them.

2. And every such office and employment shall be void, and all such persons, that after such neglect or refusal, shall execute any of the said offices or employments, after the said times expired wherein they ought to have taken the said oaths, and made and subscribed the said declaration, and being convicted upon any information, presentment, or indictment, in any of her majesty's courts in *Dublin*, or at the assizes, shall be disabled from thenceforth to sue any action in law, or to prosecute in any suit in equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office within this realm, and shall forfeit five hundred pounds, to be recovered by them that shall sue for the same in any of her majesty's courts in *Dublin*, wherein no effoign, &c. shall lie. f. 19.

3. Provided, that any person who by any neglect or refusal shall forfeit any office, may be capable of a new grant of the said office, or of any other, and hold the same again, such person taking the said oaths, and subscribing the same, and the said declaration, in such manner as aforesaid, and producing such certificate, and proving the same at the time of taking the said oaths as aforesaid, of his having received the sacrament according to the usage

usage of the church of *Ireland*, within three months then last past, so as such office be not granted to, and actually enjoyed by some other person, at the time of the regranting thereof. *f. 22.*

4. No such neglect to take the said oaths and subscribe the same, and the said declaration, or receive the sacrament, shall affect any person that shall be in *England*, so that he take the said oaths, and make and subscribe the said declaration, in one of her majesty's courts at *Westminster*, or at the general quarter-sessions for the county or place where he shall reside, and receive the sacrament of the lord's supper according to the usage of the church of *England*, and produce such certificate thereof at the time of his taking the said oaths, and subscribing the said declaration, within the respective times hereby appointed for performing the same in this kingdom. *f. 23.*

5. Or any person that during the time, or any part thereof, appointed for taking the said oaths and receiving the sacrament, shall be beyond the seas out of *England* and *Ireland*, or in her majesty's service on board the fleet, so as such person do the next term, or at the next general quarter-sessions for the place where he shall reside after his return into *England* or *Ireland*, take the said oaths, and repeat and subscribe the said declaration, and receive the sacrament within four months after his return, &c. *f. 23. § 2.*

6. Or any persons under the age of eighteen, or found by an inquisition to be *non compos mentis*, so as such persons within four months next after their coming to the said age of eighteen, or becoming of sound mind, take the said oaths, &c. in like manner as other persons to be admitted into any office or employment, are herein before appointed to do. *f. 23. § 3.*

7. Nor shall be construed to make void the grant of any office of inheritance, of any fee, salary, or reward, for executing such offices, so as such persons having any such offices of inheritance shall substitute protestants, being duly qualified to execute the said offices, to be their deputies, which such officers are hereby impowered to make or change, to exercise the said offices, until such time as the persons having such offices shall voluntarily, in one of the courts aforesaid, take the said oaths. *f. 23. § 4.*

8. And so as all such deputies take the said oaths in such manner as such officers whose deputies they are, are hereby appointed to do, so as such deputies be approved by the queen or the chief governors of this realm. *f. 23. § 5.*

9. Or to extend to the office of any high constable, petty constable, tithingman, headborough, overseer of the poor, churchwardens, surveyors of the highways, or any like inferior civil office, or any office of forester or keeper of any park or game, or bailiff of any manor, or any like private offices. *f. 23. § 6.*

10. But by the act, 6 G. 1. c. 9. *f. 2.* No persons who shall be admitted into any such offices or employments as are mentioned in stat. 2 Ann. cap. 6. shall be prosecuted upon the said act, or any disability or penalty be incurred by reason of the same, unless such prosecution be commenced within two years after such persons shall be admitted into such offices or places, and that in case of a prosecution, the same be carried on without wilful delay.

11. And by the 3 G. 3. c. 3. all persons who have incurred any penalties and incapacities in the said act mentioned, by neglecting to qualify themselves,

themselves according to the said act, are hereby discharged from all incapacities, disabilities, forfeitures, and penalties incurred, by reason of such neglect, and no act done by any of them, or by authority derived from any of them, and not yet avoided, shall be questioned by reason of such neglect, but all such acts are hereby declared to be as effectual, as if such persons had taken and subscribed the oaths, and received the sacrament, and made and subscribed the declaration.

12. Provided such persons shall take and subscribe the oaths, and receive the sacrament, and make, repeat, and subscribe the declaration, in such manner, and in such places, as are appointed by the said act to prevent the further growth of popery, on or before the first day of August, 1764. *s. 2.*

13. And whereas several of his majesty's subjects are often preferred in the army residing in Great Britain, by which they are, by the laws in force in that kingdom, obliged to qualify themselves in some part of Great Britain, by receiving the sacrament, taking the oaths, and subscribing the declaration within the time mentioned in such laws: and the regiments in which such officers have commissions so granted to them, are often ordered into this kingdom, and put upon this establishment, by which a doubt has arisen, whether such officers, notwithstanding their having qualified themselves in Great Britain for such commissions according to the said laws, are not by the laws in force in this kingdom obliged to qualify themselves after their arrival here for such commissions, no officer so preferred in Great Britain, who shall have qualified themselves for such commissions, according to and within the time limited by the laws made in Great Britain, shall be obliged to qualify themselves in this kingdom for such commissions after their arrival in this kingdom, and being put upon this establishment. *s. 3.*

14. Provided that this act shall not extend to restore or intitle any person to any office or employment, already actually avoided by judgment of any of his majesty's courts of record, or already filled up by any other person, but that such office or employment shall remain in the persons who are now intitled by law to the same. *s. 4.*

Pardon.

1. **A** Pardon is a work of mercy, whereby the king, either before the attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. *3 Inst. 233.* Pardon, what.

2. Pardons are either *general* or *special*: *General*, are by act of parliament; of which, if they are without exceptions, the court must take notice *ex officio*; but if there are exceptions therein, the party must aver that he is none of the persons excepted. *3 Inst. 233. Hale's Pl. 252.* General pardon.

By the *Brit. stat. 20 G. 2. c. 52.* for the king's general pardon; All persons are pardoned and discharged from all treasons, misprisions of treasons, felonies, treasonable and seditious words and libels, leasing making, misprisions of felony, offences whereby any person may be charged with the penalty of *præmunire*, riots, routs, offences, contempts, trespasses, entries, wrongs, deceits, misdemeanors, forfeitures, penalties, sums of money, pains of death, pains corporal, and pains pecuniary, and generally from all other things, causes, quarrels, suits, judgments, and executions,

not by this act excepted, which can by the king be pardoned, and which were done or incurred before June 15. 1747.—Excepted, persons in the service of the pretender, or of *France* or *Spain*; forging the king's seal; coining; violating the privileges of ambassadors; murders; petty treasons; poisonings; burning of houses, corn, hay, straw, wood; shooting at any person; sending threatening letters; piracy; destroying ships; offences in the navy or army; burglary; sacrilege; robbery; sodomy; buggery; rape; perjury; subornation; forgery; felony in cases of bankruptcy; destroying banks of rivers and sea banks; firing coal pits; offences against the excise, customs, land tax, post office, stamp duties, duty on houses and windows, wool, importing or exporting goods; offences concerning highways or bridges; imbezzling goods, and warlike stores of the crown; titles of *quare impedit*; incest; simony; dilapidations; first fruits; tenths; money due to the king from publick officers on account; persons transported; offences by papists; contempts in causes for non-performance of awards, or non-payment of costs; contempts in ecclesiastical courts, in causes commenced for matters of right only, and not for correction; contempts in courts of admiralty proceeding civilly, and not criminally; and excepted, several persons by name.

And the like, for the most part, hath been enacted by former statutes of general pardon.

Special pardon.

3. *Special pardons*, are either *of course*, as to persons convicted of manslaughter, or *se defendendo*, and by divers statutes to those who shall discover their accomplices in several felonies; or, *of grace*, which are by the king's charter, of which the court cannot take notice *ex officio*, but they must be pleaded. 3 *Inst.* 233.

Pardon to contain the suggestion.

4. By the 27 *Ed.* 3. c. 2. In every charter of the pardon of felony, the suggestion, and the name of him that maketh the suggestion, shall be comprized; and if it be found untrue, the charter shall be disallowed.

Pardon to specify the offence.

5. And by the 13 *R.* 2. st. 2. c. 1. No charter of pardon shall be allowed for murder, treason, or rape, unless the offence be specified therein.

Lord *Coke* says, the intention of this act was not, that the king should grant a pardon of murder by express name in the charter, but because the whole parliament conceived that he would never pardon murder by special name. And he says, he hath never seen any pardon of murder by any king of *England*, by express name. 2 *Inst.* 233, 236.

The king cannot pardon an offence before it is committed.

6. The king cannot pardon an offence before it is committed; but such pardon is void. 2 *Haw.* 389.

Cannot pardon an appeal.

7. As the release of the party will not bar an indictment at the suit of the king; so neither will a pardon by the king be any bar to an appeal at the suit of the party. 2 *Haw.* 392.

Cannot pardon a nuisance.

8. And in some cases even where the king is sole party, some things there are which he cannot pardon; as for example, for all common nuisances, as for not repairing of bridges or highways, the suit (for avoiding multiplicity of suits) is given to the king only, for redress and reformation thereof; but the king cannot pardon or discharge either the nuisance, or the suit for the same; because such pardon would take away the only means of compelling a redress of it. But it hath been holden by some, that

that a pardon of such offence will save the party from any fine, for the time precedent to the pardon. 3 Inst. 237. 2 Haw. 391.

9. Thus also, if one be bound by recognizance to the king, to keep the peace against another by name, and generally all other lieges of the king; in this case, before the peace be broken, the king cannot pardon or release the recognizance, altho' it be made only to him, because it is for the benefit and safety of his subjects. 3 Inst. 238.

Cannot discharge a recognizance.

10. Likewise, after an action popular is brought, *as well for the king as for the informer*, according to any statute, the king can but discharge his own part, and cannot discharge the informer's part; because by bringing of the action, the informer hath an interest therein: but before the action brought, the king may discharge the whole (unless it be provided to the contrary by the act) because the informer cannot bring an action or information originally for his part only, but must pursue the statute. And if the action be given to the *party grieved*, the king cannot discharge the same. 3 Inst. 238.

Cannot release an information qui tam.

11. It seems to have been always agreed, that the king's pardon will discharge any suit in the spiritual court *ex officio*: Also it seems to be settled at this day, that it will discharge any suit in such court at the instance of the party, for the reformation of manners, or welfare of the soul, as for defamation, or laying violent hands on a clerk, and such like; for such suits are in truth the suits of the king, tho' prosecuted by the party. Also, it seems to be agreed, that if the time to which such pardon hath relation, be prior to the award of costs to the party, it shall discharge them: And it seems to be the general tenor of the books, that tho' it be subsequent to the award of the costs, yet if it be prior to the taxation of them, it shall discharge them; because nothing appears in certain to be due for costs before they are taxed. 2 Haw. 394.

May discharge a suit in the spiritual court.

But it seems agreed, that a pardon shall not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like. 2 Haw. 394.

12. If the king release to a man all debts, this shall not discharge his partner; but otherwise it is in case of a subject, for in that case the release to one dischargeth both. 3 Inst. 239.

Doth not by releasing a man release his partner.

13. When a pardon is pleaded by any one for felony, the justices may at their discretion remand him to prison till he enter into recognizance, with two sureties, for his good behaviour, for any time not exceeding seven years. 5 W. c. 13.

Person pardoned may be bound to the good behaviour.

14. It seems to be a settled rule, that no pardon by the king, without express words of restitution, shall devert, either from the king or subject, an interest either in lands or goods, vested in them, by an attainder or conviction precedent: Yet it seems agreed, that a pardon prior to a conviction, shall prevent any forfeiture either of lands or goods. 2 Haw. 396.

Pardon doth not restore lands or goods forfeited.

15. A pardon after the attainder, doth not restore the corruption of blood; for this cannot be restored but by act of parliament. 3 Inst. 233.

Doth not restore the corruption of blood.

But as to issue born after the pardon, it hath the effect of a restitution of blood. 1 H. H. 358.

16. It seems to be settled at this day, that the pardon of a treason or felony, even after a conviction or retainer, doth so far clear the party from

Doth restore the credit.

Pardon.

from the infamy and all other consequences of his crime, that he may not only have an action for a scandal, in calling him traytor or felon, after the time of the pardon, but may also be a good witness, notwithstanding the attainder or conviction; because the pardon makes him as it were a new man, and gives him a new capacity and credit. 2 *Haw.* 395.

But it seems to be the better opinion, that the pardon of a conviction of *perjury* doth not so restore the party to his credit, as to make him a good witness; because it would be an injury to the people in general, to make them subject to such a person's testimony. 1 *Vent.* 349.

Parish-churches.

1. **BY** the act 2 *G.* 1. c. 9. Such money as shall be agreed upon, assessed, and ordered at vestries for building and repairing of churches, shall be levied by warrant under the hands and seals of two justices of the peace of the county where such parish doth lie, by the church-wardens, by distress and sale of the goods of the persons refusing or neglecting to pay the sums applotted on them pursuant to such act of vestry, together with the charges of such distress and sale, returning the overplus if any. *s.* 8.

And in case any persons shall think themselves aggrieved by such applotment, or the levying thereof, they shall be at liberty to appeal to the next quarter-sessions held for the said county, who are finally to determine the same.

2. And by the 3 *G.* 2. c. 11. Where any episcopal union of contiguous parishes under one incumbent or curate is or shall be made, the inhabitants or occupiers of land within every of such united parishes respectively, shall be obliged to contribute towards the repair of the church or chapel appointed for publick worship within the united parishes, and to the providing all necessary charges belonging to such church or chapel, as if such united parishes were one entire parish, and the church so appointed the parish-church of the same, and two church-wardens may every year be chosen for such united parishes respectively, and have the like office and power within the same, as other churchwardens have in their respective parishes. *s.* 1.

3. Provided, that if the parishioners of any such united parish shall at any time build up or sufficiently repair the parish-church of their parish, from thenceforth neither they nor any of them shall by this act be compelled to contribute towards the repairing of any other church or chapel within the said united parishes, excepting that of the particular parish to which they immediately belong, and the church or chapel appointed as is before mentioned for the said united parishes, shall from thenceforth be kept in repair by the rest of the parishioners of the said united parishes. *s.* 2.

4. Every parish cess or tax that shall be made at any vestry for the repair of the parish-church or chapel, or other necessary charges belonging to such church or chapel, shall, in ten days after the same is so agreed upon, be equally applotted upon the inhabitants, by the church-wardens or other persons appointed for that purpose by the major part of the protestant parishioners in vestry assembled. *s.* 3.

Which

Parish-churches.

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Which applotment shall be returned to the minister of the parish, who the first *Sunday* after he hath received the same, shall after divine service in the morning give publick notice thereof, as also of a vestry to be held in ten days after such notice, in order to have the said applotment examined into; at which vestry the major part of the protestant inhabitants there assembled, shall have power to hear all parties who shall object to the said applotment, and to make such alterations as to them shall seem reasonable, and finally to ascertain the same.

And after the same is so ascertained, they shall cause two distinct transcripts thereof to be made, each to be subscribed by the minister, church-wardens, and three of the protestant parishioners then present, one part whereof shall remain with the minister and parishioners, and the other shall be delivered to the church-wardens, who shall with all convenient expedition proceed to collect and levy the same, to be applied to the uses for which it was ordered.

And if such church-wardens shall wilfully neglect or refuse to collect any parish tax or cels so applotted and ascertained as aforesaid, or at the expiration of their office shall refuse or neglect to account for the same in any vestry to be held for that purpose, of which ten days notice shall be given in such church or chapel immediately after divine service in the morning, it shall be lawful for the succeeding church-wardens to sue for and recover from the said church-wardens the sums in the said applotment contained.

Or if after an account stated in manner aforesaid, any such church-warden shall, after a demand made, refuse or neglect to pay the balance of such account remaining in their hands to the succeeding church-wardens, it shall be lawful for the succeeding church-wardens to sue for and recover from the said churchwardens such respective sums, in cases where the same does not exceed twenty pounds, by civil bill at the general assizes to be held for the county where such parish-church or chapel is, or where such parish-church or chapel is within the city or county of *Dublin*, at the general quarter-sessions to be held for the said city or county; and in cases where any such sum exceeds twenty pounds, the same to be sued for and recovered by action of debt, &c. in any of his majesty's Four-courts at *Dublin*.

5. And in such suit or action the aforementioned applotment subscribed by the minister, church-wardens, and three parishioners, shall be sufficient evidence to charge the defendants with the several sums contained in the said applotment, and the account stated as aforesaid, shall be admitted as sufficient evidence to charge the defendants with the balance of such account. *§. 4.*

6. Provided, that if any such church-wardens refusing to account as aforesaid, shall after judgment obtained against them, and payment made as aforesaid, apply to the minister and succeeding church-wardens to be admitted to account, the minister, church-wardens, and parishioners in vestry assembled shall take such account, and such succeeding church-wardens shall pay back all such sums as the church-wardens so accounting shall prove to have been applied to the use of the parish, and also such sums as they can make appear upon oath could not be collected, by reason of the poverty or other circumstances of the parties upon whom they were applotted; which

Parish-churches.

which oath any justice of the peace for the city or county of the city where such parish-church or chapel lies, are required to administer. *s. 5.*

And if the church-wardens so accounting shall find themselves aggrieved by the determination of the said minister succeeding church-wardens and parishioners upon taking such account, they may appeal to the justices at the next general quarter-sessions for the county where such parish-church or chapel is, who are empowered to summon and examine witnesses upon oath, and finally to determine the same.

And in case they shall adjudge any sum to be repaid by the succeeding church-wardens to the church-wardens so accounting, to cause the same to be levied by distress and sale of the goods of such succeeding church-wardens, or any of them, by warrant under the hands and seals of any two of the justices present at the said sessions; and in case they shall confirm the determination of the minister, succeeding church-wardens and parishioners, they shall award such costs as they shall think reasonable, not exceeding forty shillings, to be levied by distress and sale of the goods of the persons so appealing, by warrant under the hand and seal of two of the justices present at the said sessions.

7. And whereas several parishes in this kingdom are united by charters granted by the crown, in some of which there are but very few protestants, and the parish-churches thereof ruined, or in very great decay; until such ruined or decayed churches are rebuilt or repaired, the parishioners thereof shall be obliged to contribute to the keeping in repair the church to which such parishes are united, and to the providing all necessary charges belonging thereto, in like manner, and subject to such regulations as are herein appointed for repairing of churches united by episcopal union.

8. Provided, that all money to be raised and levied as aforesaid, shall be applied to the uses mentioned in such act of vestry, and no other.

A warrant to levy money assessed for rebuilding or repairing a parish-church.

To the church-wardens of the parish of C. in the county of ———.

County of } **W** E A. B. and C. D. esquires, two of his majesty's justices of the peace for the said county, do hereby empower and authorize you, and each of you, to collect and receive the several sums of money in the annexed assessment mentioned, charged on the several inhabitants of the parish of C. in the said county, for rebuilding [or, repairing] the parish-church of the said parish; and if any of the said inhabitants shall refuse or neglect to pay the money charged on them by this assessment, we do hereby also empower and authorize you, or either of you, to levy the same by distress and sale of the goods of such person and persons who shall neglect or refuse to pay the same, rendering the overplus, after deducting the charges of such distress and sale. Given under our hands and seals. ———

I. By

1. **B**Y the act, 23 G. 2. c. 12. A vestry shall be held yearly in every parish or union, in which there shall be a place of publick worship, in which divine service shall be usually celebrated, according to the rights of the church of *Ireland*, excepting such parishes as lie, or whereof any part doth lie, within the city or suburbs of *Dublin*, on the *Tuesday* or *Wednesday* next after the 25th day of *March* in every year.

2. But by the 33 G. 2. c. 11. In every parish or union, wherein by the said last recited act it is enacted, that a vestry shall be held for assessing a maintenance for the clerk of such parish or union, such vestry shall be held on the *Monday* or *Tuesday* in *Easter-week*.

3. And by the said statute 23 G. 2. c. 12. A sum not exceeding twenty pounds, nor less than five pounds, shall at such vestry be assessed for the maintenance of the clerk of every such parish or union for the succeeding year, by the major part of the protestant parishioners then and there assembled.

And if the protestant parishioners of any parish or union, other than the parishes before excepted, shall fail to make such assessment, such parish or union shall be chargeable with five pounds for the maintenance of the clerk of such parish or union, for the year in which they shall so fail to make such assessment.

And such assessment, or in case of no such assessment, the said sum of five pounds shall within thirty days after the 25th day of *March* in every year, be equally applotted upon the parishioners, by the church-wardens or other persons appointed for that purpose, by the major part of the protestant parishioners in vestry assembled; which applotment shall be delivered to the minister, who, the first *Sunday* after he hath received the same, shall after divine service in the morning, give publick notice thereof, as also of a vestry to be held within ten days after such notice, in order to have such applotment examined into.

At which vestry the major part of the protestant parishioners there assembled, shall have power to hear all parties who shall object to such applotment, and to make alterations therein, and then finally to settle the same; and after the same shall be so settled, they shall cause two transcripts thereof to be made, each to be subscribed by the minister, church-wardens, and three of the protestant parishioners then present, one part whereof shall remain with the church-wardens, and the other shall be delivered to the parish-clerk.

And if such applotment shall not be so made, settled, and subscribed, and delivered to the parish-clerk within two calendar months after the 25th day of *March* in every year, it shall be lawful for any two justices of the peace of the county where such parish or union, or part of such parish or union doth lie, upon examination of one or more witnesses upon oath, and upon such other evidence as may be laid before them, to make and finally to settle such applotment.

Which justices are required to make two transcripts thereof, when the same shall be so settled without fee, and to sign and seal each part, and to deliver one part to the church-wardens of such parish or union, or to one of them, and the other part to the parish-clerk.

And the money so applotted by such justices, or applotted in such other manner as is before directed, shall be levied by warrant under the hands

Parish-clerks.

and seals of two justices of the peace of the county where such parish or union, or part of such parish or union doth lie, by the parish-clerk, or other persons by him appointed, by distress and sale of the goods of the persons refusing or neglecting to pay the sums so applotted upon them, together with the charges of such distress and sale, returning the overplus, if any shall be, to the owner.

4. Where the cure of two or more parishes, though not united, is served by the same person, and divine service is usually celebrated in one of the said parishes only, or in said several parishes alternately, the maintenance before provided for the parish-clerk, who shall attend the celebration of divine service in such parishes, shall be levied and applotted upon all such parishes in manner herein before directed.

5. Provided, that where in any parish or union, other than those excepted as aforesaid, there shall be one or more chapels of ease, or other place where divine service shall be performed, in such case the parishioners in vestry assembled as aforesaid, shall be impowered to raise a sum not less than four pounds, nor exceeding eight pounds a year, for each clerk of such chapels of ease, to be applotted and raised as before directed for the parish-clerk, excepting such chapels shall be served only alternately, or in less frequent turns with the church of such parish or union, in which case no provision shall be made for more than one clerk.

6. No clerk of any parish or union, other than those excepted as aforesaid, shall, during the continuance of this act, be intitled to any fee, salary, or due, by virtue of any usage or custom.

7. Whereas several persons have been excommunicated in suits instituted in the spiritual courts for the recovery of sums claimed by parish-clerks as due by custom; no process shall hereafter issue on any such excommunication, or if issued, the same shall surcease, and such excommunication shall not be considered as any disability.

Such parts of this act, as relate to the more easy providing a maintenance for parish-clerks, with the amendment made thereto by stat. 33 G. 2. c. 11. are by that act continued to the 24th of May, 1767, and unto the end of the then next session.

8. Also by the said statute 33 G. 2. c. 11. If divine service is usually celebrated in the church belonging to such parish or union, on *sundays* and other festival days, and also on common week days, the sum to be assessed at such vestry for the maintenance of the clerk of such parish or union for the ensuing year, shall be a sum not exceeding twenty pounds, nor less than ten pounds. *s. 2.*

And in all other cases, the sum to be assessed at such vestry for the maintenance of the clerk of such parish or union for the ensuing year, shall not exceed ten pounds, nor shall be less than five pounds.

And if the protestant parishioners of any parish or union, other than the parishes excepted by the said act, shall fail to make such assessment, such parish or union shall be chargeable with the sum of ten pounds, for the maintenance of the clerk of the parish or union, for the year in which they shall so fail to make such assessment, if divine service is usually celebrated in the church belonging to such parish or union on *sundays* and other festival days, and also on common week days.

And

Parish clerks.

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And in all other cases, such parish or union shall be chargeable with the sum of five pounds for the maintenance of the clerk of such parish or union, for the year in which they shall so fail to make such assessment.

And if such assessment shall be made, then the sum so assessed, or in case of no such assessment, then the said sum of ten pounds, or five pounds, as the case shall happen, shall, within thirty days after *Whitsunday* in the said year 1760, and within thirty days after *Easter-sunday* in every succeeding year, be equally apportioned in such manner as cesses for the repairs of the church are usually apportioned, or by law ought to be apportioned in such parish or union.

And after such apportionment shall be finally ascertained, and a transcript thereof shall be delivered to the church-wardens of such parish or union, or to one of them, in the manner directed by the said act, such church-wardens shall, with all convenient expedition, proceed to levy the same, together with the other cesses of such parish or union, and shall pay over the same to such parish-clerk.

And in case of their wilful neglect or refusal to collect the same, or to pay the same to such parish-clerk, such parish-clerk shall have the like remedy against such church-wardens by civil bill process, to be brought in his own name, for the recovery of the sum so apportioned for him.

And such church-wardens shall have the like remedy over against such parish or union, as is enacted by an act made in the third year of his present majesty's reign, intitled, *An act for the better keeping churches in repair*.

9. In every chapel of ease wherein provision is made by the said recited act of the twenty third year of his present majesty's reign, for the yearly maintenance of the clerk of such chapel of ease, such yearly maintenance shall be assessed, apportioned, levied, and paid in such manner as is herein before directed for the parish-clerks, with such remedy for the recovery thereof, by the clerk of such chapel of ease, and such remedy over for the church-wardens of the parish or union to which such chapel of ease shall belong, as is herein before provided, concerning the yearly maintenance for parish-clerks. *f. 3.*

Parliament.

1. **B**y the 2 G. 1. c. 19. Upon every election to be made of knights of the shire to serve in parliament in taking the poll, the sheriffs, or their under-sheriff and clerks, shall enter not only the place of the electors freehold, but also the place of his abode, as he shall declare the same at the time of the giving his vote, and also shall make or enter *jurat* against the name of every such voter to whom the oath hereby required shall be tendered, and by whom the same shall be taken.

2. And by the 19 G. 2. c. 11. The said sheriff or returning officer, shall within twenty days after such election, faithfully deliver over upon oath, which oath the two next justices of the peace are required to administer unto the clerk of the peace of the same county, all the poll books of such elections, without any embezzlement or alteration, to be preserved among the records of the sessions of the peace of the said county.

4 A 2

3. Every

Parliament.

3. Every freehold of the yearly value of forty shillings, and under ten pounds *per annum*, shall at some quarter-sessions after the passing this act, and before the election at which any freeholder shall offer himself to vote, be registered six months before the election in manner following, that is to say, every such freeholder shall in open court before the justices of the peace at the quarter-sessions for the county where such freehold lieth, make the following affidavit, or if a *Quaker*, the following affirmation.

N. N. of A. in the county of B. maketh oath or affirmeth, as the case shall be, that he hath a freehold of the clear yearly value of forty shillings, lying and being at C. in the county of D.

Which affidavit or affirmation when duly sworn or affirmed, shall be read, allowed in open court, and delivered by order of the court to the acting clerk of the peace of the said county, to be filed and kept amongst the records, and the acting clerk of the peace shall immediately write in a book to be by him kept in an alphabetical order for that purpose, the following entry or registry *N. N. of A. in the county of B. hath registered his freehold, lying at G. in this county this day of in the year of our Lord.*

4. For which affidavit or affirmation, entry or registry, six pence and no more shall be paid by such freeholder to the person acting as clerk of the peace at the time of such registry; and in case such freehold shall not have been so registered six calendar months before the election, such freeholder shall not be intitled to vote for such freehold at such election.

5. The acting clerk of the peace shall on or before the last day of every sessions, deliver to the treasurer of the said county, a true copy of such entry and registry so by him from time to time made, which copy shall be kept by the said treasurer amongst the accounts of the said county.

6. All freeholders registered at any quarter-sessions held by adjournment, shall be adjudged to be well registered, as if the same had been registered before any adjournment of the sessions, provided that every such adjourned sessions be held in open court where the sessions have been usually held, or in the court where the assises are usually held, and not elsewhere.

7. Also by the 3 G. 3. c. 13. Upon every election of any member or members to serve for the commons in parliament, every freeholder, citizen, freeman, burgess, or person, having, or claiming to have, a right to vote or be polled at such election, shall before he is admitted to poll at the same election take the following oath (or being of the people called *Quakers*, shall make the solemn affirmation appointed for *Quakers*) in case the same shall be demanded by either of the candidates, or any two of the electors: (that is to say)

I A. B. do swear (or being of the people called Quakers, I A. B. do solemnly affirm) I have not received or had by my self, or any person whatsoever in trust for me, or for my use and benefit, or for the use and benefit of any of my family or kindred, to my knowledge or belief, directly or indirectly, any sum or sums of money, office, place or employment, gift or reward, or any promise or security for any money, office, employment or gift, in order to give my vote at this election, and that I have not before been polled at this election.

8. The

8. The officer or officers presiding at such elections, shall appoint a justice of the peace for the purpose of administering the said oath or affirmation in open court, so as the poll shall not be thereby retarded.

And the said justice shall, in the presence of four or more persons to be nominated by each candidate, administer the said oath to every elector before such elector shall be admitted to poll, if the same shall be demanded as aforesaid.

And if the officers presiding at such election shall refuse to appoint a justice of the peace for the purpose aforesaid, or if the said justice shall refuse to administer the same *gratis*, if demanded as aforesaid, such officer, or justice of the peace, shall forfeit fifty pounds to any person that shall sue for the same, to be recovered, together with full costs of suit, by action of debt, bill, plaint or information, in any of his Majesty's courts of record in *Dublin*, wherein no *essoign*, &c. shall be allowed.

And no person shall be admitted to poll till he *has* taken and repeated the said oath in a public manner, in case the same shall be demanded as aforesaid, before such justice of the peace as shall be deputed.

9. If any sheriff, mayor, bailiff, or other returning officer, shall admit any person to be polled without taking such oath or affirmation, if demanded as aforesaid, such returning officer shall forfeit one hundred pounds, to be recovered in manner aforesaid, together with full costs of suit; and if any persons shall vote or poll at such election without having first taken the oath, or if a *Quaker* having made his affirmation, if demanded as aforesaid, such person shall incur the same penalty, which the officer is subject to for the offence above mentioned.

10 Every sheriff, mayor, bailiff, seneschal, or other person, being the returning officer of any member to serve in parliament, shall immediately after the reading of the writ or precept for the election of such member, take and subscribe the following oath:

I A. B. do solemnly swear, that I have not directly or indirectly received any sum or sums of money, office, place, or employment, gratuity, or reward, or any bond, bill, or note, or any promise or gratuity whatsoever, either by myself or any other person to my use, or benefit, or advantage, or to the use, benefit, or advantage of any of my family or kindred, or to my knowledge or belief, for making any return at the present election of members to serve in parliament, and that I will return such person or persons as shall, to the best of my judgment, appear to me to have the majority of legal votes.

Which oath any justices of the peace of the said county, city, corporation, or borough, where such election shall be made, or in their absence, any three of the electors are *thereby* required and authorized to administer, and such oath so taken shall be entered among the records of the sessions of such county, city, corporation, and borough as aforesaid.

11. A member of parliament shall have the privilege of parliament, not only for himself and his servants, to be freed from arrests, subpoena, citations, and the like; but also for his horses and goods to be free from distresses: but for treason, felony, and breach of the peace, there can be no privilege. 4 Inst. 24, 25.

12. By

12. By the 6 *An. c. 8. f. 3.* The privilege of parliament shall begin forty days before the beginning or meeting of every parliament, and shall continue during the setting or adjournment, and forty days after the prorogation or dissolution of every parliament.

13. Where any plaintiff shall by reason of privilege of parliament be stayed from prosecuting any suit, such plaintiff shall not be barred by any statute of limitation, nor shall his suit be discontinued for want of prosecution, but such plaintiff shall be at liberty immediately after the rising of the parliament, to proceed to judgment and execution, as if such plaintiff had not been hindered from prosecuting his suit by privilege of parliament. *f. 4.*

14. It shall be lawful for all persons during the continuance of privilege of parliament (as the same is hereby before declared, to distrain the goods and chattles of any peer, lord of parliament or member of the house of commons, for the arrears of any rent, duty, or service which shall become due, and to dispose of such distresses as if the goods so distrained did not belong to any member of either house of parliament. *f. 5.*

15. No peer, lord of parliament, or member of the house of commons, who shall be a trustee, guardian, executor or administrator, shall have any benefit of privilege of parliament in any suit which shall be prosecuted against them as trustee, guardian, executor or administrator, in any court of law or equity, or in any ecclesiastical or other court.

16. No suit or proceeding in law or equity against any immediate debtor to the queen, for the recovery of any debt or duty originally and immediately due to her majesty, or against any accountant unto her majesty for any part of her revenues, or for any immediate debt or duty, nor the execution of any such process or proceeding shall be impeached or delayed by pretence of privilege of parliament; yet so that the person of any such debtor or accountant being a peer of this realm, or lord of parliament, or being a member of the house of commons, shall not, during the continuance of privilege, be arrested or imprisoned upon any such action or proceedings.

17. But by the act 8 *G. 1. c. 2. f. 2.* No privilege of parliament shall be allowed in any ejectment brought for the recovery of lands, &c. on account of non-payment of rent, nor in any suit commenced against any persons on account of their wilful holding over any lands, &c. after the determination of their term contrary to the intent of the act 11 *Ann. cap. 2. for the more effectual preventing of frauds committed by tenants*; nor in any suit or motion to obtain any injunction or writ of *estrepement* to prevent waste.

18. And by the 1 *G. 2. c. 8.* Actions may be commenced and proceeded on, against peers or members of parliament, immediately after any dissolution, or prorogation for above 14 days, until they meet again. — Allowing nevertheless a reasonable time for their return from parliament; for their privilege existeth, not only during the time of their sitting, but for a reasonable time both before and after, for their going and returning. *Str. 985. Col. Pitt's case.*

20. By the 2 *G. 2. c. 7.* The parliament shall not be dissolved by the king's death or demise; but shall continue to sit and act for six months, unless sooner dissolved by the successor; and if there be no parliament; the next preceding parliament shall meet and act, as if they had not been dissolved.

By

BY the 8 & 9 W. c. 31. intituled, An act for the easier obtaining partitions of lands in coparceny, joint-tenancy, and tenancy in common, it is enacted, that if the high sheriff cannot conveniently be present at the execution of any judgment in partition, in such case the under sheriff in presence of two justices may proceed to execution of the writ of partition.

Peers.

1. **D**UKES, earls, and barons are not conservators of the peace at common law; and have no more power as such, than mere private persons. *2 Haw. 32.* Not conservators of the peace.

2. The safest way of proceeding against a peer, for sureties of the peace or good behaviour, is by complaint to the court of chancery or king's bench. *1 Haw. 127.* Sureties of the peace against them.

3. A nobleman must be tried by his peers: but this is to be understood only at the suit of the king, upon an indictment of high treason, petit treason, felony, or misprision thereof; but in case of a præmunire, riot, or the like, and generally for all other crimes out of parliament (unless otherwise specially provided for by statute, as it is in many instances), tho' it be at the suit of the king, he shall not be tried by his peers, but by the freeholders of the county. *3 Inst. 30. 2 Haw. 424.* Trial of peers.

4. Process of outlawry lies against a peer, if he be indicted, and appears not, and cannot be taken; otherwise he might take advantage of his own contumacy. *3 Inst. 31.* Whether they may be outlawed.

5. Peers shall have the benefit of clergy for the first offence of felony, without burning in the hand. *1 Ed. 6. c. 12. f. 14.* Whether they shall be burnt in the hand.

6. A peer produced as a witness, ought to be sworn. *3 Keb. 631.* Evidence.

Perjury and Subornation.

I. Of perjury and subornation by the common law.

II. Of perjury and subornation by the statute of the 5 El.

III. Of matters common to them both.

I. Of perjury and subornation by the common law.

1. **P**ERJURY by the common law, seemeth to be a wilful false oath, by one who being lawfully required to depose the truth in any judicial proceeding, swears absolutely, in a matter material to the point in question, whether he be believed or not. *1 Haw. 172. 3 Inst. 164.* Perjury at the common law.

Wilful] The false oath alledged against him, should be proved to be taken with some degree of deliberation; for if upon the whole circumstances

Perjury and Subornation.

ces of the case it shall appear probable, that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury. 1 Haw. 172.

False] It is said not to be material, whether the fact which is sworn, be in itself true or false; for however the thing sworn may happen to prove agreeable to the truth, yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears, to proceed upon the credit of a deposition, which any stranger might make as well as he. 1 Haw. 175.

Being lawfully required] It seemeth clear, that no oath whatsoever, taken before persons acting merely in a private capacity; or before those who take upon them to administer oaths of a public nature, without legal authority; or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void,——can amount to perjuries, but are altogether idle and of no force. 1 Haw. 174.

In any judicial proceeding] For tho' an oath be given by him that hath lawful authority, and the same is broken, yet if it be not in a judicial proceeding, it is not perjury; because such oaths are general and extrajudicial; but it serves for aggravation of the offence. Such are, general oaths given to officers or ministers of justice, the oath of fealty and allegiance, and such like. Thus if an officer commit extortion, it is against his general oath, but yet not perjury, because not in a judicial proceeding; but when he is charged with extortion, the breach of his oath may serve for aggravation. 3 Inst. 166.

If a person calleth another *perjured* man, he may have his action upon his case, because it must be intended contrary to his oath in a judicial proceeding; but for calling him a *forsworn* man, no action doth lie, because the forswearing may be extrajudicial. 3 Inst. 166.

Swears absolutely] For the deposition must be direct and absolute; and not, as he thinketh, or remembreth, or believeth, or the like. 3 Inst. 166.

In a matter material to the point in question] For if it be not material, then tho' it be false, yet it is no perjury, because it concerneth not the point in issue, and therefore in effect it is extrajudicial. 3 Inst. 167.

But it is not necessary that it appear *to what degree*, the point in which a man is perjured, was material to the issue; for if it is but circumstantially material, it will be perjury. L. Raym. 258.

Much less is it necessary that the evidence be sufficient for the plaintiff to recover upon; for in the nature of the thing, an evidence may be very material,

terial, and yet it may not be full enough to prove directly the point in question. L. Raym. 889.

Whether he be believed or not] It hath been holden, not to be material upon an indictment of perjury at common law, whether the false oath were at all credited, or whether the party in whose prejudice it was intended, were in the event any way aggrieved by it or not; inasmuch as this is not a prosecution grounded on the damage of the party, but on the abuse of publick justice. 1 Haw. 177.

2. Subornation of perjury, by the common law, seems to be *an offence, in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath.* 1 Haw. 177. Subornation at common law.

But it seemeth clear, that if the person incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain, that he is liable to be punished, not only by fine, but also by infamous corporal punishment. *id.*

3. The punishment of perjury and subornation of perjury by the common law, is restrained by the statute of the 28 El. hereafter following; that it shall not be less, than is inflicted by that statute. Punishment of perjury at the common law.

4. Mr. Hawkins says, it hath been of late settled, that justices of the peace have no jurisdiction over perjury at the common law; the principal reason of which resolution, he says, as he apprehended, was, that inasmuch as the chief end of the institution of the office of these justices was, for the preservation of the peace against personal wrongs and open violence, and the word *trespass* (in the commission) in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only, or at the most to extend to such other offences only, as have a direct and immediate tendency to cause such breaches of the peace; as libels, and such like, which on this account have been adjudged indictable before justices of the peace. 2 Haw. 40. Power of justices of the peace therein.

And in the case of *K. and Bainton, E. 11 G. 2.* An indictment at the quarter sessions for perjury at the common law, was quashed for want of jurisdiction; and was said to have been done so about three years before, in the case of *K. and Westinefs.* Str. 1088.

II. Of perjury and subornation by the statute of the 28 El. c. 1.

As to subornation of perjury, in the first place, *Every person who shall unlawfully and corruptly procure any witness to commit any wilful and corrupt perjury; in any matter or cause depending in suit and variance, by any writ, action, bill, complaint, or information, touching any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages; in chancery, or in any court of record, leet, ancient demesne court, hundred court, court baron, or court of chancery; or shall unlawfully and corruptly procure or suborn any witness which shall be sworn to testify in perpetuam rei memoriam, — shall forfeit 40l. half to the king, and half to the party grieved who shall sue for the same. And if he has not lands or goods worth 40l. he shall be imprisoned half a year, and stand on the pillory an hour in open market. And he shall be disabled to be a witness in any court of record.* Perjury and subornation on the 5 El. c. 9.

Perjury and Subornation.

And as to perjury, *If any person, either by subornation or otherwise, shall wilfully and corruptly commit any wilful perjury, by his deposition in any the courts before mentioned, or being examined in perpetuam rei memoriam; he shall forfeit 20l. in like manner, and be imprisoned six months; and if he has not goods worth 20l. he shall be set on the pillory in the market place by the sheriff, and have both his ears nailed. And he shall be for ever disabled to be a witness in any court of record.*

And the judge of the court, where the perjury shall be, and the judges of assize, and justices of the peace in sessions, may inquire, hear, and determine thereof, by inquisition, presentment, bill, or information, or otherwise.

But this act shall not extend to any ecclesiastical court.

Also this statute shall not restrain the authority of any judge, having absolute power to punish perjury before the making thereof, but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done, and used to do, to all purposes, so that they set not upon the offender less punishment, than is contained in the said statute. 28 El. c. 1.

Any witness] If the defendant perjureth himself in his answer in the chancery, exchequer chamber, or the like, he is not punishable by this statute; for it extendeth but to witnesses. 3 Inst. 166.

By any writ, action, bill, complaint, or information] It hath been resolved, that these words are to be extended to the latter clause concerning perjury, as well as to this concerning subornation; because it cannot well be intended, that the makers of the act, who inflict a greater penalty on subornation of perjury, than on the perjury itself, should mean to extend the purview of the law in relation to what they esteemed the lesser crime, farther than in relation to that which they esteemed the greater. 1 Haw. 179. 5. Co. 99.

But it is to be observed, that perjury or subornation in an action depending by indictment, are not within this statute; but only in an action depending by writ, action, bill, complaint, or information. 3 Inst. 164.

Half to the party grieved] It hath been collected from this clause, that no false oath is within the meaning of this statute, which doth not give some person a just cause of complaint: and upon this ground it hath been said, that he who swears a thing which is true, but not known by him to be so, is not within this statute; because howsoever heinous his offence may be in its own nature, yet when it proves in the event to be in maintenance of the truth, it cannot be said to give him a just cause of complaint, who would take advantage against another from his want of legal evidence to make out the justice of his cause. Also from the same ground it seemeth clearly to follow, that no false oath can be within the statute, unless the party against whom it was sworn suffered some kind of disadvantage by it; for otherwise it cannot be said, that any one was grieved by it: and therefore that in every prosecution upon this statute, it must appear upon the trial, that there was such a suit depending, wherein the party might be prejudiced in the manner supposed. 1 Haw. 181.

Either

Either by subornation, or otherwise] It is not necessary to set forth in the indictment, whether the party took the false oath thro' the subornation of another, or without any such subornation, these words being only superfluity. *1 Haw. 179.*

Wilfully and corruptly] These words are necessary in an indictment or action on this statute, and cannot be supplied by adding *against the form of the statute*, or by concluding *and so a wilful and corrupt perjury did commit.* *1 Haw. 178.*

Justices in sessions] And one justice may bind the offender over to the sessions. *Dalt. c. 70.*

But because the prosecution upon this statute is more difficult than by indictment at the common law, offenders are seldom prosecuted upon this statute, especially at the sessions; and it seems generally the safer way to proceed by indictment at the common law, at the assizes, or in the court of king's bench.

Shall not restrain] From this it seemeth undoubtedly to follow, that the court of king's bench, &c. proceeding upon an indictment or information of perjury or subornation of perjury at the common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any inquiry concerning the value of his lands or goods. *1 Haw. 178.*

III. Of matters common to them both.

1. By the act 3 G. 2. c. 4. The more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury, besides the punishment already to be inflicted by law for so great crimes, it shall be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time; or to be transported to some of his majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper, and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being.

And if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported, shall voluntarily escape or break prison, or return from transportation before the expiration of the time, for which he shall be ordered to be transported, such person being thereof convicted, shall suffer death as a felon, without benefit of clergy, or of the statute,

Perjury and Subornation.

statute, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.

This act is continued, for twenty-one years from the 25th of March, 1757, by 29 G. 2. c. 8. s. 9.

Insufficient indictment not quashed.

Evidence.

Certiorari.

Perjured person not to be a juror, or a witness.
Quakers.

Pardon.

2. The court generally will not quash an indictment for a crime of so enormous a nature as perjury, for insufficiency in the caption or body of it, but will oblige the defendant either to plead or demur to it. 2 Haw. 258.

3. To convict a man of perjury, a probable evidence is not enough; but it must be a strong and clear evidence, and the witnesses must be more numerous than those on the side of the defendant, for otherwise it is only oath against oath. 10 Mod. 194.

And the party prejudiced by the perjury, shall not be admitted to prove the perjury. L. Raym. 396.

4. It seems that the court will not ordinarily at the prayer of the defendant grant a certiorari for the removal of an indictment of perjury; for such crime deserves all possible discountenance, and the certiorari might delay, if not wholly discourage the prosecution. 2 Haw. 287.

5. A person convicted of perjury is disabled from being a juror. 2 Haw. 417. Or a witness. 2 Haw. 433.

6. Quakers making solemn affirmation wilfully and corruptly, shall suffer as in cases of perjury. 8 G. c. 6. s. 2.

7. Perjury and subornation are excepted out of the general pardon of the 20 G. 2. c. 52.

Petition.

BY the 13 C. 2. c. 5. No person shall solicit above 20 hands, to any petition to the king, or either house of parliament, for alteration of matters established by law in church or state, unless the matter thereof hath been consented to by three or more justices of the county, or by the major part of the grand jury at the assizes or sessions; nor shall present any such petition accompanied with more than ten persons, on pain of a sum not exceeding 100*l.* and three months imprisonment, on conviction at the assizes or sessions in six months, and proved by two witnesses.

But this shall not extend to debar any persons (not above ten in number), to present any complaint to any member of parliament after his election, and during the continuance of parliament, or to the king, for any remedy to be thereupon had; nor to any address to the king by the parliament.

1. BY

1. **BY** the act 9^{W.} 3. c. 39. No persons using the trade of pewterers and braisiers, or who trade or deal in the same within this realm, shall sell or change any pewter or brass, new or old, save only in open fairs and markets, or in their publick shops and dwelling houses, upon pain that every person acting contrary hereunto, shall, for every such offence, forfeit forty shillings, the one half to go to the use of the poor of the parish where such offence shall be committed, the other half to the persons that shall seize, find, or prosecute for the same.

2. No person shall cast, make, or work any new pewter or brass vessel, but such as shall be of as good fine metal, as the pewter and brass wrought after the perfect goodness required for the same within the city of *London*, upon pain of forfeiture of all such pewter and brass vessels, wrought contrary thereunto, the one half of such forfeiture to be to the use of the poor of the parish where such offence shall be committed, the other half to the use of the discoverer and prosecutor for the same.

Which offences shall be examined and determined, in all cities and corporate towns, by and before the mayor or other head officer of such city or town corporate, and in all other places by and before two justices of the peace of the respective counties where such goods shall be so seized, who are required to examine the said matters on oath of one witness, and to give judgment thereupon, for the forfeiture of such goods to the uses aforesaid, or otherwise, for discharging and restoring the same, as they shall see cause.

Which judgment so given, such mayor, justices of the peace, or other officer are required to return and certify, to the justices of the peace at the next quarter-sessions, to be held for such city, town corporate, or county respectively, that the same may be there entered of record.

3. Provided, that no pewter and brass shall be so seized or forfeited, save only such as shall, at the time of such seizure, be in the possession of some pewterer or brasier, or other person using the said trade, or selling such pewter or brass, or of some persons in trust for them, and not such as shall be in the possession of any other person not using such trade as the proper goods of such other person.

4. No person shall make any hollow wares, that is to say, salts and pots or the like, of pewter called lay-metal, which shall be of coarser or worse metal, than according to the assize of lay-metal wrought within the city of *London*.

And the makers of such wares shall make the same wares with several and particular marks of their own, to the intent that the makers of such wares shall avow the same, and such wares may appear to be made by them, and all such wares not so sufficiently made, wrought, or marked, found in the possession of the maker or seller, shall be seized as forfeited.

And if the same ware be sold before such seizure, then the maker shall forfeit the value of same ware so unlawfully wrought and sold, the one half of such forfeiture to be to the use of the poor of the parish where such offence shall be committed, and the other half to the use of the finder and prosecutor for the same; such offences to be examined, heard, and determined as aforesaid.

6. If

Pewter and other metals.

6. If any person using, buying, and selling of pewter and brass, shall have or make use of any deceitful or false beams or weights, such persons shall, for every such offence, forfeit five pounds, the one half to the poor of the parish where such offence shall be committed, the other half to the persons discovering and prosecuting for the same, such prosecution to be before such respective persons, and in like manner as for the other offences before mentioned, and such persons are hereby authorized and required to act therein, as in cases of such other offences.

And if the offenders shall not be sufficient to pay the said sums so by them forfeited, it shall be lawful for such persons, before whom such offences shall be tried, to put such offender in the stocks for two hours, and after to continue him in custody until the next market day for the place where such offence shall be committed, and then in the open market-place, during the chief time of such market, to put and continue him with his head in the pillory for the space of one hour.

7. And the justices of the peace within every county are required, at the general sessions of the peace, to be held for their respective counties, at *Michaelmas* in every year, to appoint two certain persons having experience in such goods, to make search in the premises in every part of the said county, as well within franchises as without, except in cities or boroughs where persons are appointed for that purpose, by the head officer or governors of the same, and to seize such offenders and goods, and bring the same before such justices of the peace, in order to their further procedure thereon as aforesaid.

Physicians.

Physician killing a patient.

IF a physician gives a person a potion without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a surgeon. And I hold their opinion (says lord *Hale*) to be erroneous, that think if he be no licensed surgeon or physician, that occasioneth this mischance, that then it is felony; for physick and salves were before licensed physicians and surgeons; and therefore if they be not licensed according to the statute of the 3 *H. 8. c. 11.* or 14 *H. 8. c. 5.* they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter. These opinions therefore may serve to caution ignorant people not to be too busy in this kind in tampering with physick, but are no safe rule for a judge or jury to go by. 1 *H. H. 429.*

1. PILLORY

1. **P**ILLORY is derived from *pilastre*, a pillar; for it is a wooden pillar, wherein the neck of the offender is put and pressed; which kind of punishment is very ancient, and was used by the Saxons. 3 Inst. Pillory and tumbrel, what.

219. The *tumbrel* seemeth to have been the same anciently with the *ducking stool*; an engine for the punishment of scolding women, by ducking them over head and ears in water, and especially in muddy or stinking water, according to the etymology of lord Coke, who tells us, that the word *tumbrel* signifieth a dung cart. Lamb. 61. 3 Inst. 219.

2. Every one that hath a leet or market, ought to have a pillory and tumbrel to punish offenders; and it seems that a leet may be forfeited for not taking care to have a pillory and tumbrel. 3 Inst. 219. 2 Haw. 75. Who shall find them.

3. They that have been adjudged to the pillory or tumbrel, are so infamous, that they shall not be received to be jurors or witnesses. 3 Inst. Infamy of the punishment.

219. 4. And for that the judgment to the pillory or tumbrel doth make the delinquent infamous, the justices of the peace should be well advised before they give judgment of any person to the pillory or tumbrel, unless they have good warrant for their judgment therein. Fine and imprisonment, for offences fineable by them, is a fair and sure way. 3 Inst. 219. Caution in inflicting it.

5. But by several statutes the punishment of the pillory is specially ordained; as in the case of bakers, forestallers, users of false weights, and many others. Inflicted by several statutes.

Plague.

1. **A**LL vessels, persons, and goods coming from any place, from whence the king, with the advice of his privy council, shall judge probable that the infection may be brought, shall be obliged to make their quarentine in such places, for such time, and in such manner as shall be directed by him, or by his order made in council, and notified by proclamation, or published in the gazette. 26 G. 2. c. 6. s. 1. Quarentine enjoined.

2. And when the king shall make any orders concerning quarentine, and notify the same by proclamation, or in the gazette, the same shall be publicly read the next *sunday*, and the first *sunday* in every month afterwards (during the time such orders shall continue) immediately after prayers, in all places set apart for divine worship, within such places as shall be specified in such proclamation or orders. *id.* s. 20. Orders for quarentine to be read in churches.

3. And the justices of the counties adjoining, or one of them, shall forthwith, when quarentine shall be appointed, cause watches to be kept by day and night, in the most proper and convenient places, within the several adjacent parishes: who shall not permit any person whatsoever to come on shore from, or go on board any ships under quarentine, except only such as shall have the charge of seeing the quarentine duly performed, or as shall be licensed by such person having charge of the quarentine. 9 An. c. 2. Watchmen to be appointed.

And

Plague.

And if any superintendant of the quarentine, or watchman, shall neglect his duty, he shall be guilty of felony without benefit of clergy. 26 G. 2. c. 6. f. 17.

Masters of ships
to give notice.

4. And if the plague shall appear on board any ship, being to the northward of *Cape Finisterre*, the master shall immediately proceed to the harbour of [St. *Helen's Pool*, between the uninhabited islands of St. *Helen's*, *Tean*, and *North Witbell*, or to such other place as his Majesty by advice of his privy council shall appoint; 29 G. 2. c. 8.] where he shall make known his case to some officer of the customs; who shall immediately acquaint some custom house officer of some near port of *England*; who shall with all possible speed send intelligence thereof to a secretary of state: and the ship shall remain there till his Majesty's pleasure be known; nor shall any of the crew go on shore. But if he shall not be able to make the islands of *Scilly*, or shall be forced by weather or otherwise to go up either of the channels, he shall not enter any port, but remain in some open road, till he receives orders from his Majesty, or his privy council; and shall prevent any of the crew from going out of the ship, and avoid all intercourse with other ships or persons. And the said master, or any other person on board, who shall be disobedient herein, shall be guilty of felony without benefit of clergy; and may be tried where the offence shall be committed, or where he shall be apprehended. 26 G. 2. c. 6. f. 2.

Vessels to be
examined.

5. And when any country or place is infected, or when any order shall be made by the king concerning quarentine, as often as any vessel shall attempt to enter into any port, the principal officer of the customs there, or such person as shall be authorized to see quarentine performed, shall go off, or cause some other person to go off, to such vessel; who shall at a convenient distance, demand of the commander, the name of the ship; the name of the commander; at what place the cargo was taken on board; what place the vessel touched at in her voyage; whether such places, or any, and which, were infected with the plague; how long she hath been in her passage; how many persons were on board when she set sail; whether any, and what persons, during the voyage, have been or are infected; how many died in the voyage, and of what distemper; what vessels he, or any of his company, with his privy, went on board, or had any of their company come on board his ship, and to what place they belonged; and also the true contents of his lading, to the best of his knowledge: And if it shall appear on such examination, or otherwise, that any person on board is infected, or that such ship is obliged to perform quarentine; the officers of any of his Majesty's ships of war, or of any forts or garrisons, and all other his Majesty's officers whom it may concern, and others whom they shall call to their assistance, shall, on notice thereof, oblige such ship to repair to the place appointed for quarentine, be it by firing of guns, or other force: And if such vessel shall come from any place infected, or have any person on board infected, and the master shall conceal the same, he shall be guilty of felony without benefit of clergy; and if he shall not make a true discovery in any other of the particulars, he shall forfeit 200*l.* half to the king, and half to him that shall sue. 26 G. 2. c. 6. f. 3.

Officer
neglecting.

7. And if any officer of the customs, or other officer, shall neglect his duty herein; he shall forfeit his office, and 100*l.* in like manner. 26 G. 2. c. 6. f. 11.

7. And

7. And the master, after his arrival at the place of quarentine, shall deliver on demand to the chief officer appointed to see quarentine duly performed, such bill of health and manifest as he shall have received from any *British* consul, together with his log-book and journal; on pain of 500*l.* in like manner. 26 *G. 2. c. 6. f. 4.* Master to deliver his credentials.

8. And all persons, liable to perform quarentine, shall be subject to such orders as they shall receive from the officers authorized to see it performed; who shall have power to enforce obedience, and in case of necessity to call others to their assistance. 26 *G. 2. c. 6. f. 9.* Obedience enforced.

And by the 26 *G. 2. c. 6.* If the master shall quit, or knowingly permit any person to quit the ship, by going on shore, or on board any other vessel, before the quarentine shall be performed, unless in such cases as shall be permitted by the orders concerning quarentine; or if he shall not, in convenient time after notice, cause the vessel and lading to be conveyed to the place appointed for quarentine, he shall forfeit 500*l.* half to the king, and half to him that shall sue: And if any person shall so quit such ship, all persons by any kind of force may compel him to return; and he shall for such offence be imprisoned six months, and forfeit 200*l.* half to the king, and half to him that shall sue. *f. 5.*

9. When any part of *Great Britain, Ireland, Guernsey, Jersey, Alderney, Sark, or Man, France, Spain, Portugal,* or the low countries shall be infected, the king, by proclamation, may prohibit all small boats and vessels, under the burden of 20 tons, from sailing out of port, till security be first given by the master, to the satisfaction of the principal officer of the customs, or chief magistrate of the port, by bond to the king with sureties, in the penalty of 300*l.* that he shall not go to or touch at any place mentioned in the proclamation; and that the master and every mariner and passenger shall, during the time aforesaid, not go on board any other vessel at sea; and that he shall not permit any person to come on board such boat or vessel at sea; and shall not receive any goods out of any other vessel; for which bond no fee shall be taken. And if such boat or vessel shall sail before such security given, the same, together with the tackle and furniture, shall be forfeited to the king; and the master, and every mariner therein, being thereof convicted, on his appearance or default, on oath of one witness, by one justice where the offender shall be found, shall forfeit 20*l.* half to the informer, and half to the poor of the parish where the offender shall be found, by distress; and for want of sufficient distress to be committed to prison for three months. 26 *G. 2. c. 6. f. 19.* In what case small vessels shall not be allowed to sail.

10. Whenever the king, with the advice and consent of parliament, shall direct lazarets to be provided, for receiving of persons obliged to perform quarentine, or for airing of goods, it shall be lawful to erect the same, either in any waste grounds or commons, or where there are not sufficient, in the several grounds of any person whatsoever, not being a house, park, garden, orchard, yard, or planted walk, or avenue to a house, paying for the same as shall be agreed on between the persons interested, and any two persons appointed by the king under his sign manual; and if they cannot agree, then the said two persons shall, 30 days before the sessions, give to the occupier a notice in writing, describing the quantity of ground, and purporting that the consideration for the same will be settled by a jury at such sessions. And the justices there, on proof of such notice, shall charge the jury which shall attend

tend there (or some other jury to be then and there impanelled and returned by the sheriff without fee) and cause to be sworn, well and truly to assess the value of such grounds, to whom the parties may have their lawful challenges; and the verdict of the said jury, and the judgment of the justices thereupon, shall be conclusive, and finally bind all parties; and thereupon the king shall hold such grounds for such term as he shall judge necessary, paying for the same such rent or other consideration as shall be so assessed. 26 G. 2. c. 6. s. 6.

And the officers authorized to put in execution such orders as aforesaid, shall cause all persons obliged to perform quarantine, and all goods comprized in such orders, to repair or be conveyed to some of the said lazarets, or to such other places as shall be provided according to such orders. *id.* s. 7.

And if any person shall refuse or neglect to repair, within convenient time after notice, to the lazaret, or other place appointed, or shall escape or attempt to escape from thence, before quarantine performed; the watchmen, and other persons appointed to see quarantine performed, by force may compel him to repair or return thither: and every person so refusing or neglecting to repair thither, and also every person actually escaping, shall be guilty of felony without benefit of clergy. *id.* s. 8.

Persons entering
lazarets, not to
return till qua-
rentine per-
formed.

11. And if any person not infected nor liable to perform quarantine, shall enter any lazaret, or other such place, and shall return or attempt to return, unless as permitted by such orders; the watchmen, or other persons appointed, by force may compel him to return and perform quarantine: and if he shall actually escape before he hath performed the same, he shall be guilty of felony without benefit of clergy. *id.* s. 10.

Secreting goods
under quaran-
tine.

12. If any person shall conceal from the officers of quarantine, or convey any letters or goods from any ship under quarantine, or from any lazaret, he shall be guilty of felony, without benefit of clergy. 26 G. 2. c. 6. s. 18.

Damaging
goods.

13. If any officer or other person shall embezzil or damage any goods performing quarantine; he shall pay treble damages, with full costs. 26 G. 2. c. 6. s. 11.

Discharge after
quarantine per-
formed.

14. After quarantine performed, and on proof thereof by the oaths of the master and two other persons of the ship, or by the oaths of two credible witnesses, before the customer, comptroller, or collector of that or the next port, or their deputies, or a justice near, and that the vessel and every such person are free from infection; and after producing a certificate thereof signed by the chief officer who superintended the quarantine; such officer of the customs, or justice, shall give a certificate thereof (*gratis*), and thereupon the vessel and every such person shall be liable to no further restraint. 26 G. 2. c. 6. s. 13, 14.

And all goods liable to quarantine shall be opened and aired, as by such orders shall be directed; and after such order hath been complied with, and a certificate thereof given by the chief officer appointed to superintend the quarantine and airing of such goods, and proof made thereof by the oaths of two witnesses, before the customer, comptroller, or collector of the next port, or any of their deputies, or any justice living near; on certificate and return of such proof by such custom house officer to the commissioners of the

Plague.

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the customs, they or two of them by their order shall discharge the same.

f. 15.

And if any person shall take any fee for such oath, order, or certificate; he shall forfeit 100*l.* half to the king, and half to him that shall sue. *f. 16.*

And if any superintendant of the quarentine, or watchman, shall in such case give a false certificate; he shall be guilty of felony without benefit of clergy. *f. 17.*

Polygamy.

BIGAMY is, where a man has two wives successively; Polygamy, where he has several wives at the same time. *3 Inst. 88. Stam. 134.*

By the 10 C. 1. *ff. 2. c. 21.* If any person, being married, shall marry any person, the former husband or wife being alive; such offence shall be felony (but within clergy).

If the first marriage was beyond sea, and the latter in Ireland, the party may be indicted here, because the latter marriage makes the offence; but if the first marriage was in Ireland, and the latter beyond sea, it seemeth that the offender cannot be indicted here, because the offence was not within the kingdom. *Kely. 79, 80.*

But this act shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas, by the space of seven years together. *id.*

And this, altho' the party in Ireland hath notice, that such husband or wife is living. *1 H. H. 693.*

Nor to any person whose husband or wife, shall absent him or herself, the one from the other, by the space of seven years together, in any part of his Majesty's dominions, the one of them not knowing the other to be living within that time. *id.*

Nor to any person who shall be, at the time of such marriage, divorced by sentence in the ecclesiastical court. *id.*

And this divorce is to be understood not only a *vinculo matrimonii*, as for precontract, consanguinity, or affinity, which dissolveth the marriage, and therefore needeth not this proviso; but also, and chiefly a *mensa & thoro*, as for adultery, which dissolveth not the marriage, yet in respect of the generality of the words, a person divorced only a *mensa & thoro* is privileged from being a felon in marrying again, altho' the second marriage is void. *3 Inst. 89. 1 H. H. 694.*

Nor to any person whose former marriage hath been, by sentence in the ecclesiastical court, declared to be void, and of none effect. *id.*

Nor to any person, by reason of any former marriage made within age of consent. *id.* That is, either the woman being under 12, or the man under 14. *3 Inst. 89.*

On a prosecution upon this statute, the first and true wife is not to be allowed as a witness against the husband; but it seems clear, that the second wife may be admitted to prove the second marriage, for she is not his wife so much as *de facto*. *1 H. H. 693.*

- I. *General observations.*
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I. *General observations.*

1. **I**T is to be observed in general, that *popish* recusants are liable to all the forfeitures and disabilities, and other inconveniences, to which other recusants are liable; and to many others, to which other recusants are not liable.

For to be a *recusant*, doth not necessarily imply the being a *papist*: but a *recusant* is any person who refuses to go to church, and worship God, after the manner of the church of *England*: A *popish recusant*, is a *papist* who so refuseth: and a *popish recusant convicted*, is a *papist* legally convicted thereof. For the want of attending to which distinction, divers authors who have treated of this subject, have fallen into confusion.

2. There are several statutes made against recusants in *Q. Elizabeth's* reign, and the former part of the reign of *K. James the first*, which are not restrained to *popish* recusants only; but as there were few or no other recusants but *papists* at that time, they have regard chiefly to persons of that profession: and therefore they are inserted under this title: although the words of them do extend, and the act of toleration supposes them to extend, to all nonconformists in general. But the force of them as to *protestant* dissenters is taken away by that act. But no *papist*, or *popish recusant*, shall have any benefit by the act of toleration.

3. The reader will observe from the dates of the several acts, how the penalties have from time to time been enforced and enlarged, upon every fresh attempt

attempt against the government; especially at the several periods during Q. Elizabeth's reign, after the powder plot in the reign of K. James the first, and after the rebellion in 1688. One of the acts particularly, immediately after the powder plot, which will often occur in the following sections, is in the statutes at large, a well penned act. It is much in the style of lord Coke; strong, and clear: where tho' many words are used, yet none of them can be wanted. And probably it was drawn up by him. It brings the several laws together, which had been enacted on the subject it treats of; and renders them all useless and dead, as much as if it had repealed them in express words. And it may be a pattern in reducing into one general law, the several statutes which on many heads are now become very numerous, and not a little confused.

4. In perusing this whole title, wherein the laws against papists are brought clearly together in one view, it will occur possibly to remark, that they are many, and perhaps severe. But it ought to be considered withal, how protestants are treated in popish countries; and that the offences intended to be guarded against by these laws, are not the stealing of an ox, or the burning of an house, or any other invasion of private property, but dethroning the prince, and overturning the government.

'Tis true, these laws in the present age have been permitted to sleep in a great measure, and that, even at a time when a rebellion was advancing, and a foreign invasion attempted in favour of a popish prince and government: but they are suffered nevertheless to continue in force; perhaps that it may appear to the enemies of our constitution, that if they are spared, it is not for want of power, but of inclination to punish.

II. Popish supremacy opposed and abolished.

1. Whoever shall affirm, that the king hath not the supreme authority in causes ecclesiastical, shall be excommunicated *ipso facto*, and not restored but by the archbishop on his repentance. *Cau. 2.*

2. By the statute of the 27 Ed. 3. *st. 1. c. 1.* which is called the statute of provisors; persons suing in a foreign realm, or impeaching judgments given in the king's court, shall incur a *præmunire*; that is, shall have a day given to appear in person to answer to the contempt, and if they come not, they shall be out of the king's protection, their lands and goods shall be forfeited, and their bodies imprisoned, and ransomed at the king's will.

And if any bring into the realm a summons or excommunication against any one executing the statute of provisors, he shall suffer pain of life and member. *13 R. 2. st. 2. c. 3.*

3. And by the 5 El. *c. 1.* If any person shall maintain the authority of the see of Rome in this realm he shall incur a *præmunire* for the first offence, and for the second shall be guilty of high treason. Prosecution to be within a year. And the justices in sessions may enquire thereof, and shall certify the same into the king's bench. *f. 2, 3, 4, 10, 11.*

4. And if any person shall put in practice to absolve or withdraw any subjects from their allegiance, or if any person shall be willingly so absolved or withdrawn; he, his aiders and maintainers shall be guilty of high treason. The tryal to be at the assizes, or in the king's bench. *En. stat. 3. f. c. 4. f. 22, 23, 25.*

III. Con-

III. Concerning the pope's presentation to benefices.

1. No person by authority from the court of Rome, shall disturb any parson of the holy church, presented or collated by the king or his subjects; on pain of fine and imprisonment. 25. Ed. 3. ft. 6.
2. None shall take any benefice of an alien, or convey money to him for the farm thereof, on pain of incurring a præmunire. 3 R. 2. c. 3.
3. No alien shall purchase or occupy a benefice in England; on pain of a præmunire. 7 R. 2. c. 12.
4. He that shall go out of the realm, to procure a benefice, shall be out of the king's protection; and the same shall be void. 12 R. 2. stat. 2. c. 15.
5. If any person shall accept a benefice from the pope, he shall be banished for ever, and his lands and goods forfeited. 13 R. 2. ft. 2. c. 2.
6. No provision of a benefice not vacant, made by the pope, and licensed by the king, shall be available; but persons endeavouring to exclude the incumbent thereby, shall incur a præmunire. 7 H. 4. c. 8. 3 H. 5. ft. 2. c. 4.

IV. Bringing bulls and other instruments from Rome.

1. By the statute of the 16 R. 2. c. 5. (which is the famous statute called the statute of præmunire) If any person shall purchase, or bring unto the realm, any bulls or instruments from Rome, or elsewhere, they shall incur a præmunire: that is to say, they shall be put out of the king's protection; and their lands and goods shall be forfeit to the king; and they shall be attached by their bodies, if they may be found, and brought before the king and his council, there to answer; or else process shall be awarded against them by *præmunire facias* (so called from those words in the writ).
2. But by a subsequent statute, if any person shall get or publish any bull or instrument from Rome, he shall be guilty of high treason. And his aiders and comforters shall incur a præmunire. And concealing the same shall be misprision of high treason. *En. stat. 13 El. c. 2. f. 3, 4, 5.* And the justices of the peace may enquire thereof, within a year and day. *En. stat. 23 El. c. 1. f. 8.*

V. Popish books and relicks.

1. If any person shall have in his custody any books called antiphoners, missals, grales, processional, manuals, legends, pies, portuassies, primers in latin and english (except those set out by K. H. 8.) couchers, journals, ordinals or other books for the service of the church, not set forth by the king; he shall forfeit for the first offence 20s. for the second 4l. and for the third shall be imprisoned at the king's will. And the justices of the peace in their general sessions may hear and determine the same. *En. stat. 3 & 4 Ed. 6. c. 10.*

2. No

2. No person shall bring from beyond the seas, nor shall print, sell, or buy any popish primers, ladies psalters, manuals, rosaries, popish catechisms, missals, breviaries, portals, legends, and lives of saints, containing superstitious matter, printed or written in any language whatsoever; nor any other superstitious book printed or written in *English*; on pain of 40s. one third to the king, one third to him who shall sue in any court of record, and one third to the poor of the parish where such book shall be found; and the books to be burned. *En. stat. 3. 1. 6. 5. f. 25.*

3. If any person shall bring into the realm any agnus dei, crosses, pictures, beads, or such like vain and superstitious things, from the bishop of Rome, or any authorized by him to consecrate the same, and offer them to any person to be worn or used; both the bringer and receiver shall incur a praemunire: but if the receiver shall in one day's time deliver the same to a justice of the peace, or if such person to whom the same is offered shall carry the bringer before the next justice, or (if he cannot) shall disclose the offender's name and place of abode or resort, to the bishop, or to a justice of the peace, he shall not incur such praemunire. And in such case, the justice in 14 days shall signify the same to one of the privy council, on pain of incurring a praemunire. *En. 13. El. c. 2. f. 7, 8, 10.*

4. And two justices of the peace (and mayors and other chief officers in corporations) may search the houses and lodgings of every popish recusant convict, or of every person whose wife is a popish recusant convict, for popish books and relicts of popery: and if any altar, pix, beads, pictures, or such like popish relicts, or any popish book, shall be found in their custody, as in the opinion of the said justices, mayor, or other chief officer, shall be thought unmeet for such recusant to have or use, the same shall be presently defaced and burnt, if it be meet to be burned; and if it be a crucifix, or other relict of any price, the same to be defaced at the sessions, and returned to the owner. *En. stat. 3. 1. 5. f. 26.*

VI. Foreign education of papists.

1. If any person shall contribute or send over sea, any money, or other relief to any seminary abroad; he shall incur a praemunire. *27. El. c. 2. f. 6.*

2. They who be in seminaries abroad shall return in six months after proclamation, and conform in two days, before the bishop, or two justices of the peace; otherwise if they return at all, without submission, they shall be guilty of high treason. *En. 1. 27. El. c. 2. f. 5.*

3. If any person shall go, or send any person, beyond the seas, to be popishly educated, who shall be there so instructed, or shall send any money or other thing for that purpose; he shall, on conviction before the judges of the king's bench, or of assize, be disabled to be plaintiff in any action, or to be committee of any ward, or executor, or administrator or capable of any legacy or deed of gift, or to bear any office; and shall forfeit his goods, and shall forfeit his lands during life. But if he shall conform in six months after his return, he shall be discharged. *En. 1. 1. f. 4. 6, 7.*

Popery.

4. Children, not being soldiers, mariners, merchants, or their apprentices or factors, departing the realm, on account of education, or otherwise, without licence from the king, or six of the privy council, shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of any lands or goods, until they conform. *En. st. 3. f. c. 5. f. 16.*

5. No woman, or child under 21, except sailors or factors, shall pass over sea without licence of the king and council; on pain that the officer of the port shall forfeit his office and his goods, the owner of the ship his vessel, and the master his goods and be imprisoned 12 months. *f. c. 4. f. 8.*

6. By the act, 7 *W. 3. c. 4.* In case any of his majesty's subjects of Ireland, shall go or shall send any child or other person beyond the seas out of his majesty's obedience, to the intent to be resident or trained up, in any priory, abby, nunnery, popish university, college, or school, or house of Jesuits or priests, or in case any of his majesty's subjects of this kingdom, shall go or be sent into any parts beyond the seas out of the king's obedience, to the intent to be resident or trained up in any private popish family, and shall be beyond the seas instructed in the popish religion, in any sort to profess the same, or shall convey or send any money or other thing, towards the support of any person that shall go or be sent, and be instructed as aforesaid, or under the colour of any charity or alms towards the relief of any college, school, or any religious house; every person so going, sending, conveying, &c. as well any such child or other person, as any money or other thing, and every person passing or being sent beyond the seas contrary to this act, and being thereof convicted in manner hereafter mentioned, or upon any information, presentment, or indictment for any the offences as aforesaid, to be found by any jury of twelve men, where such persons shall have any estate of inheritance when they did so send or go, such persons shall be disabled to prosecute any action, &c. in course of law or any suit in equity, or to be guardian or executor or administrator, or capable of any legacy or deed of gift, or to bear any office within the realm, and shall forfeit all their goods and chattels which they or any other persons have in trust for them, and shall forfeit all their lands and hereditaments, offices and estate of freehold, and all trusts, powers, and interests therein, during their lives. *f. 1.*

7. If any information be given to any justice of the peace, that any such child or other person, money or other thing, are gone or sent away contrary to this act, such justice is required to cause to be brought before him, all such persons suspected or charged to have offended therein, and shall examine the persons so suspected or accused without oath, and shall examine any other witnesses upon their oaths, concerning the same; and if upon such examination it shall appear probable that such person, money or other thing, are gone or sent away contrary to this act, the said justices shall bind the said suspected persons with sufficient sureties, and such other persons as he shall judge fit to give evidence, and the said informers, in recognizances of two hundred pounds, or such greater sums as to the said justices shall seem reasonable, with condition to appear at the next quarter-sessions to be held for the county, where such offences are supposed to be committed, or where the offenders did last reside or were taken, and not to depart the said court without licence. *f. 2.*

And

And the said justice shall at the first sitting of the said court of quarter-sessions, return the said examinations and recognizances unto the clerk of the peace in open court, who shall cause an information to be framed against such persons, or suspected persons, who shall instantly answer thereunto and proceed to trial thereon.

And in case upon such trial, it shall by proof appear to the court, that any person, money, or other thing, was by them sent or conveyed into any parts beyond the seas out of his majesty's obedience; and in case by such proof it shall appear probable to the said court, that such sending or conveying was contrary to this act, then they shall take upon themselves the proof where such person so by them sent then is, and also to what intent such money or other thing were sent by them beyond the seas.

And in case any such children or other persons that shall go, or be sent, or conveyed away as aforesaid, or any money by way of exchange or any other means, shall be sent into foreign parts contrary to the intent of this act, such going or sending, shall be adjudged to be going or sending contrary to this act, unless the parties denying the same shall prove the contrary; or if by failure of such proof or otherwise upon examination it shall appear to the said court, that such offences have been committed contrary to this act, the same being entered on record shall be a conviction as well of the persons so being sent as of the parties so sending, and they shall forfeit and incur all the penalties and disabilities before mentioned.

8. If any persons against whom such judgment shall be given as aforesaid, shall find him or herself aggrieved thereby, it shall be lawful for such persons to appeal to the justices of assize of the said county at the next assizes, which justices of assize are authorized in the same assizes to cause the said proceedings in the quarter-sessions to be brought before them, and there to review and examine the same, and to reverse, alter, and confirm the same as to justice shall appertain. *s. 4.*

And all officers in whose custody such proceedings and conviction shall be at the time of such inquiry by the said judges of assize, shall obey the orders and directions of the said judges of assize therein.

9. Every such person sent as aforesaid, that shall within six months after his return into this kingdom, in the chancery or king's bench in term time, between the hours of eight and twelve in the morning, take the oaths and repeat and subscribe the declaration appointed by one act, lately made in the parliament of *England for abrogating the oath of supremacy in Ireland, and appointing other oaths*, shall from thenceforth be discharged of all the incapacities and disabilities aforesaid; and shall from the time of his taking such oaths, &c. be restored to the receipt of the future issues and profits of his real estate only, but shall lose all the past issues and profits thereof and all his personal estate. *s. 5.*

10. If such persons after their taking the said oaths, and making, repeating, and subscribing the said declaration, profess themselves of the popish religion, or refuse the taking the said oaths, and repeating and subscribing the said declaration, when the same shall be to them tendered by the justices of the peace in their open quarter-sessions for the county or place where such persons shall reside, which the said justices are required

to tender to all whom they shall suspect to have relapsed or shall upon due summons refuse to appear at such quarter-sessions for the purpose aforesaid, the said persons shall incur all the disabilities, penalties, and losses herein before contained, as if such persons had never taken the said oaths, &c. *f. 6.*

11 If any person shall upon his trial before the justices at the quarter-sessions, be acquitted by the said court, of any offence against this act, or upon his appeal to the judges of assize as by this act is directed shall be acquitted, or in case he shall upon his trial be acquitted by the jury, upon any indictment, presentment, or information prosecuted against him for any offence contrary to this act, such person shall not be liable after such acquittal to be prosecuted upon this act in any other manner for the same offence. *f. 8.*

12. And by the 2 *Ann. c. 6.* If any person being a papist or professing the popish religion, shall send, or cause, or willingly suffer to be sent, any child under the age of one and twenty years, except sailors, ship-boys, or the apprentice or factor of some merchant in trade of merchandize into *France*, or any other parts beyond the seas out of her majesty's dominions without the special licence of her majesty, or chief governors of this kingdom, and four or more of her privy council of this realm, under their hands first obtained, they shall incur the penalties and forfeitures mentioned in an act made in the seventh year of king *William, c. 4. to restrain foreign education. f. 1.*

13. Where any of the judges of her majesty's courts of queen's bench, common pleas, or barons of the exchequer, or any two justices of the peace, shall have reasonable cause to suspect that any such child except before excepted, and also except such children as shall be sent abroad with such licence as aforesaid, has been sent into foreign parts, they are required to convene the father or mother, or such other relation, guardian, or persons as had the tuition or care of the said child, and shall require them to produce before them the said child within two months after. *f. 2.*

And if such persons shall not produce and bring before the said judge or justices such child within the said time, or shew reasonable cause for the obtaining further time for the same till the next following quarter-sessions of the county wherein such persons shall reside, or shall not give good proof that the said child is resident somewhere within this kingdom, or the kingdom of *England* or *Scotland*, and not in parts beyond the seas, such child shall be deemed to be then educated in foreign parts contrary to the aforesaid act, and shall incur all the penalties and disabilities in the said act mentioned.

VII. Penalty of perverting others, or being perverted to popery.

If any person shall put in practice to reconcile any subjects to popery, or if any person shall be willingly so reconciled; he, his aiders and maintainers, shall be guilty of high treason. The trial to be at the assizes, or in the king's bench. *En. st. 3 f. c. 4. f. 22, 23, 25.*

And

And by the 2 *Ann. c. 6. s. 1.* If any persons shall seduce, persuade or pervert, any person that shall profess the protestant religion to forsake the same, and to profess the popish religion, or reconcile them to the church of Rome, persons so seducing, as also every protestant who shall be so perverted and reconciled to popery, shall for the said offences, being thereof convicted, incur the penalty of *premunire* mentioned in the statute of *premunire* made in *England 16 Ric. 2.*

VIII. Jesuits and popish priests.

1. No jesuit or popish priest shall come into or be in the realm, on pain of high treason; unless he conform. *En. st. 27 El. c. 2. s. 2, 3, 10.*

2. And if any person shall knowingly receive or relieve any such, he shall be guilty of felony without benefit of clergy. *En. st. El. c. 2. s. 4.*

3. And if any person, knowing such jesuit or priest to be in the realm, shall not in 12 days discover the same to a justice of the peace or other higher officer, he shall be fined and imprisoned at the king's pleasure. And if such justice or other officer shall not in 28 days give information thereof to one of the privy council, he shall forfeit 200 marks. *En. st. 27 El. c. 2. s. 11.*

4. And a suspected jesuit or popish priest, being lawfully examined, and refusing to answer whether he be a jesuit or popish priest, shall be imprisoned till he make direct and true answer. *En. st. 35 El. c. 2. s. 11.*

5. And the person who shall first discover, to any justice of the peace, any person who shall entertain or relieve any jesuit, seminary, or popish priest, within three days after the offence; so that by reason of such discovery any offender shall be taken and convicted: such person shall not only be freed from any penalty for such offence, if himself be an offender therein, but shall also have the third part of the forfeitures if they do not exceed 150 *l.* and if they do exceed 150 *l.* then he shall have 50 *l.* *En. st. 3 J. c. 5. s. 1.*

6. And by the 9 *W. 3. c. 26.* All popish archbishops, bishops, vicars-general, deans, jesuits, monks, friars, and all other regular popish clergy, and all papists exercising any ecclesiastical jurisdiction, shall depart out of this kingdom before the first day of *May* one thousand six hundred ninety eight, and if any of the said ecclesiastical persons shall be at any time after the said day within this kingdom, they shall suffer imprisonment, and remain in prison till they shall be transported out of his majesty's dominions, wherever his majesty or the chief governors of this kingdom shall think fit, and if any person so transported shall return again into this kingdom, they shall be guilty of high treason. *s. 1.*

7. No popish bishop, &c. nor any other papist exercising any ecclesiastical jurisdiction, not established by law, jesuit or friar, shall come into this kingdom on pain of twelve months imprisonment, and then to be transported in manner aforesaid; and if any such romish ecclesiastical person so transported shall again return into this kingdom, he shall be guilty of high treason. *s. 3.*

8. Any person that shall knowingly harbour, relieve, conceal or entertain any such popish bishop, &c. or any other papist exercising any ecclesiastical jurisdiction, not established by law, or any regular popish clergyman hereby required to depart out of this kingdom, or shall come into this kingdom contrary to this act, shall for the first offence forfeit twenty pounds, for the second offence double the said sum, to be levied in manner herein after expressed, and if he shall offend the third time, to forfeit all his lands of freehold or inheritance during his life, and also all his goods and chattels. *f. 4.*

9. Upon information on oath to any justice of peace against any persons that shall knowingly entertain or conceal any such popish bishop, jesuit, friar or other ecclesiastical popish person contrary to this act, the said justice shall issue a summons requiring the persons so informed against, at a certain day and place within the county where such offence shall be committed, to appear before him and some other justice of the said county, to answer the said matter laid to their charge, at which time and place the said justices shall in presence of the persons accused, or in case of their neglect to appear, being duly summoned, proceed to the examination of the matter. *f. 5.*

And if it shall appear to them on evidence upon oath, that the persons so complained of, are guilty, the said justices shall by warrant levy the aforesaid forfeitures of twenty pounds for the first offence, and forty pounds for the second offence, of the goods of the persons offending, and dispose of one moiety of such forfeitures to the informers, and the other moiety to the treasurer of the county for the use of the county, and for default thereof to commit the person offending to the county gaol until they shall pay the said penalties.

10. If any persons shall think themselves aggrieved by the judgment of such two justices of the peace, the persons so aggrieved may appeal to the next judges of assize, or to the justices at the next quarter-sessions, who are empowered to examine the matter and give relief therein. *f. 7.*

11. Every justice of the peace shall from time to time issue their warrants for apprehending and committal of all popish bishops, jesuits, friars, and other popish ecclesiastical persons that shall remain in this kingdom contrary to this act, and for suppressing all monasteries, friaries, nunneries, or other popish fraternities or societies. *f. 8.*

12. All and every the justices of the peace shall give an account in writing of their proceedings in execution of this statute at the next quarter-sessions for the county in which he shall dwell, which shall be at such quarter-sessions entered and registered. *f. 9.*

13. If any justice of the peace, mayor, or other officer, shall neglect doing their duty in execution of this act, every such justice and other officer shall for every such neglect forfeit one hundred pounds, to be recovered by action of debt, &c. wherein no essoin, &c. shall be allowed, nor but one imparlance, one moiety thereof to the King, the other moiety to the informer or person that shall sue for the same, and be disabled from serving as a justice of peace during his life. *f. 10.*

14. Also by the 2 *Ann. c. 3.* Every clergyman of the popish religion that shall come into this kingdom, shall be liable to such penalties, forfeitures

feitures and punishments, as by the act 9 Will. 3. c. 26. is imposed on popish bishops, &c. or any other papists exercising any ecclesiastical jurisdiction, who shall come into this kingdom contrary to the said act; and any person who shall knowingly harbour, relieve, conceal or entertain any such clergyman of the popish religion, shall be liable to such penalties and forfeitures, as by the said act is imposed on the harbourers and concealers of any popish bishop, &c. or regular popish clergyman, to be levied in the same manner as by the said act is directed. *f. 1.*

15. All justices of the peace, sheriffs, high and petty constables, and all other subjects are required to use their utmost diligence in apprehending all such regular or other popish priest, who shall come into this kingdom contrary to this act. *f. 2.*

16. If any mayor, justice of the peace, or other officer, shall neglect doing their duty in execution of this act, every such justice and other officer, shall for every such neglect forfeit one hundred pounds, to be recovered by action of debt, &c. wherein no essoign, &c. shall be allowed, one moiety thereof to the queen, the other moiety to the informer or person that shall sue for the same, and be disabled from serving as a justice of the peace during his life. *f. 3.*

17. All persons who shall return or come into this kingdom contrary to the aforementioned statute, or shall come into this kingdom contrary to this act, may be indicted and tried for the same in such county wherein they shall be taken, or in any county where her majesty, &c. by commission under the great seal of this kingdom shall appoint. *f. 4.* This act is made perpetual by stat. 8 Ann. cap. 3.

18. Likewise by the 4 Ann. cap. 2. If any popish priest or person exercising the function of a popish priest, shall be found in this kingdom, other than such priests who have registered their names in pursuance to the act 2 Ann. cap. 7. for registering the popish clergy, shall be liable to such penalties as by the act 9 Will. 3. cap. 26. made for banishing all papists exercising any ecclesiastical jurisdiction, and all regulars of the popish clergy out of this kingdom, are imposed on popish bishops, or any other papists exercising any ecclesiastical jurisdiction, who shall come into this kingdom contrary to the said act. *f. 1.*

19. Any persons who shall knowingly harbour, relieve, conceal or entertain any such clergyman of the popish religion, or other persons exercising the function of a popish priest, and not registered as aforesaid, shall be liable to such penalties and forfeitures as by the said acts are imposed on the harbourers and concealers of any popish bishop, &c. or regular popish clergyman, to be levied in the same manner as by the said act is directed. *f. 2.*

20. All justices of the peace, sheriffs, high and petty constables, and all other subjects, are required to use their utmost diligence in apprehending all such popish priests, and other persons exercising the function of a popish priest, and not registered as aforesaid. *f. 3.*

21. If any mayor, justice of the peace, or other officer, voluntarily shall neglect their duty in execution of this act, every such mayor, justice of the peace and other officer, shall for every such neglect forfeit fifty pounds, to be recovered by action of debt, &c. wherein no essoign, &c. shall be allowed,

allowed, nor more than one imparlance, one moiety thereof to the queen, and the other moiety to the informer or person that shall sue for the same.
f. 4. This act is made perpetual by stat. 8 Ann. cap. 3.

IX. Saying and bearing mass.

1. If any person shall say or sing mass, he shall forfeit 200 marks, and be imprisoned for a year, and till paid;

And if any person shall wilfully bear mass, he shall forfeit 100 marks, and be imprisoned for a year;

The forfeitures to be one third to the king, one third to the poor, and one third to him who shall sue in any court of record. And if not paid in 3 months after judgment, he shall be committed till he pays or conforms. And the sessions may determine the same. *En. stat. 23 El. c. 1. f. 4, 9, 10, 11.*

2. And the person who shall first discover to any justice of the peace any mass to have been said, and the persons that were present thereat, and the priest that said the same, or any of them, within 3 days after the offence, and by reason of such discovery any offender is taken and convicted; such person shall not only be freed from any penalty for such offence, if himself be an offender therein, but shall also have the third part of the forfeitures, if they do not exceed 150*l.* and if they do exceed 150*l.* then he shall have 50*l.* and after conviction of the offender, he shall have a certificate from the judges or justices of the peace before whom the conviction shall be, directed to the sheriff or person who shall seize the goods, or levy the forfeiture, commanding him to pay the same. *En. st. 3 J. c. 5. f. 1.*

3. And conveyances made by recusants to evade the penalties for saying or hearing mass, shall be void. *En. st. 29 El. c. 6. f. 1.*

4. And by the 8 *Ann. c. 3.* It shall be lawful for any two justices of the peace, whereof one to be of the *quorum*, by warrants directed to any constable, to summons any popish person of the age of sixteen years or upwards to appear before such justices at a certain time and place in the warrants to be expressed within three days after the date of the said warrants, so that the said place of appearance be not above five miles from the habitation of the said person. *f. 21.*

5. And if the person so summoned shall neglect to appear accordingly, or appearing shall refuse to give his testimony upon oath where and when he heard, or was present at the celebration of the popish mass as the same is used in the church of *Rome*, and who celebrated the same, and who were present at the celebration thereof, and likewise touching the residence and abode of any popish regular clergyman, and also fully answer to all such circumstances and things touching such popish persons offending contrary to this and the former act to prevent the further growth of popery, such persons so refusing or neglecting to appear or to answer, shall be committed by the said justices to the common gaol for twelve months, unless he or she shall pay down a sum not exceeding twenty pounds, to be paid to the minister, churchwardens and overseers of the poor of the parish where such offender shall reside, for the use of the poor of the said parish. *Ibid.*

X. Penalties

X. Penalties for not going to church.

1. All persons, having no lawful or reasonable excuse to be absent, shall resort to their parish church or chapel, or upon reasonable let thereof, to some usual place where divine service shall be performed according to the liturgy and practice of the church of *Ireland*, upon every *Sunday* and holiday; on pain of punishment by the censures of the church, or of forfeiting to the poor for every offence 12*d.* to be levied by the churchwardens by way of distress. 2 *El. c. 2. f. 14, 24.* Except dissenters qualified by the act of toleration, who resort to some congregation of religious worship allowed by that act. 6 *G. I. c. 5. f. 11.*

And he who is absent from his own parish church, shall be put to prove where he went to church. 1 *Haw. 13.*

And one justice, on proof (in one month after default) by confession, or oath of one witness, may call the party before him; and if he shall not make sufficient excuse, and due proof thereof to the satisfaction of the justice, such justice shall give warrant to the churchwarden to levy 12*d.* to the use of the poor of the parish for every default, by distress and sale, rendering the overplus. For want of distress, commitment till paid. *En. ft. 3 f. c. 4. f. 27, 28.*

2. Every person above the age of 16 years, who shall not repair to some church, chapel, or usual place of common prayer, being convicted thereof before the judges of assize, or justices of the peace in their open quarter sessions, shall forfeit 20*l.* a month, one third to the king, one third to the maintenance of the poor of the parish, and of the houses of correction and of impotent and maimed soldiers, as the lord treasurer, chancellor, and chief baron of the exchequer shall order, and one third to him who shall sue in any court of record. If not paid in 3 months after judgment, he shall be imprisoned till he pay, or conform himself to go to church. *En. ft. 23 El. c. 1. f. 5, 11. 29 El. c. 6. f. 7.*

Note; These two last statutes, by inflicting 20*l.* for a month's absence, dispense not with the forfeiture of 12*d.* on the former statutes for the absence of one *sunday*; for both may well stand together; and the 12*d.* is immediately forfeited upon the absence of each particular day. 1 *Haw. 13.*

3. And every offender in not repairing to church, being once convicted, shall pay into the exchequer at *Easter* or *Michaelmas* term which shall first happen after the conviction, 20*l.* for every month contained in the indictment; and shall also afterwards, without any other indictment or conviction, pay into the exchequer at every *Easter* and *Michaelmas* term 20*l.* for every month till he conform; except where the king may refuse the same, and take two parts of the lands as hereafter is mentioned. *En. ft. 3 f. c. 4. f. 8.*

4. And every conviction recorded, shall by the court be certified into the exchequer, and if default shall be made in any part of payment, the king may by process take the goods, and two parts of the lands of the offenders. *En. ft. 3 f. c. 4. f. 9.*

5. Also the king may refuse the penalty of 20 *l.* a month for not coming to church, and in lieu thereof may seize two parts of the offender's lands, and keep them till he conform. 3 *J. c. 4. f. 10, 11.*

6. And where seizure shall be made of two parts of the lands, for the penalty of 20 *l.* a month, such two parts shall, according to the extent thereof, go towards payment, but the third part shall not be extended or seized. And when the recusant shall die, and the said penalty not paid, the king shall keep the two parts, until the whole be thereby, or otherwise, paid. *En. st. 1 J. c. 4. f. 5.*

7. And every person who shall retain in his service, or shall relieve, keep, or harbour in his house any servant, sojourner, or stranger, who shall not repair to church, but shall forbear for a month together, not having reasonable excuse, shall forfeit 10 *l.* for every month he shall continue in his house such person so forbearing. And the sessions may hear and determine the same. *En. st. 3 J. c. 4. f. 32, 33, 36.*

8. And conveyances made by recusants to evade the penalties for not coming to church, shall be void. *En. st. 29 El. c. 6. f. 1.*

9. And the justices in sessions shall have power to enquire, hear, and determine of all recusants and offences for not repairing to church; and shall have power at the sessions where an indictment is taken for such offence, to make proclamation, by which it shall be commanded that the body of the offender shall be rendered to the sheriff, bailiff, or gaoler, before the next sessions: And if he shall not appear of record at the next sessions, then upon such default recorded, he shall stand convicted. *En. st. 3 J. c. 4. f. 7.*

10. And no indictment or other proceeding against recusants shall be reversed (unless they conform) for any want of form, nor by any thing but by direct traverse to the point of not coming to church. *En. st. 3 J. c. 4. f. 16.*

11. But every person who shall usually on *sundays* have in his house divine service as established by law, and be thereat himself usually present, and shall four times a year at least go to the parish church or other common church or chapel, he shall not incur any penalty for not repairing to church. 23 *El. c. 1. f. 12.* And this also shall not extend to protestant dissenters, who resort to some place of religious worship allowed by the act of toleration. 6 *G. c. 5.*

12. And the churchwardens and constables shall (on pain of 20 *l.*) present at the quarter sessions once a year, the monthly absence from church of all recusants, and the names and ages of their children above nine years of age, and the names of their servants. And the presentments shall be entered by the clerk of the peace without fee, on pain of 40 *s.* And if the party presented shall be indicted and convicted, such churchwarden or constable shall have a reward of 40 *s.* to be levied of the recusant's goods by warrant of the justices in sessions. *En. st. 3 J. c. 4. f. 4, 5, 6.*

XI. *Papists confined to their habitations.*

1. Every person above 16 years of age, being a popish recusant, and having any certain place of abode, who being convicted for not repairing to some church, chapel, or usual place of common prayer to hear divine service

vice

vice there, but forbearing the same contrary to law, shall within 40 days next after the conviction (if he be within the realm, and not hindered by imprisonment, by command of the king or council, or by sickness, and in such case in 20 days after the removal of such impediment) repair to his usual dwelling, and shall not remove above five miles from thence, unless he be licensed as is herein after directed, on pain of forfeiting his goods, and also to the king his lands during life, unless they be customary or copyhold, and then to the lord of the manor. *En. st. 35 El. c. 2. s. 3. 5.*

And it seemeth that these shall be computed according to the *English* manner, allowing 1760 yards to a mile, and that the same shall be reckoned not by streight lines, as a bird or arrow may fly; but according to the nearest and most usual way. *1 Haw. 25.*

2. Having repaired to their dwelling, they shall within 20 days notify their coming, and present themselves, and deliver their true names in writing to the minister of the parish, and to the constable, and the minister shall enter the same in a book. *En. st. 35 El. c. 2. s. 6.*

3. And, after, the minister and constable shall certify the same in writing to the next sessions; and the clerk of the peace shall enter the same in the rolls of the sessions. *En. st. 35 El. c. 2. s. 7.*

4. And if such recusant (not being a feme covert) have not lands of 20 marks a year, or goods worth above 40 *l.* and shall not conform in 3 months, being thereto required by the bishop, or a justice of the peace, or the minister; he shall abjure the realm before two justices of the peace, or the coroner: who shall enter the same of record, and certify the same at the next assizes. And if he shall refuse to abjure, or not depart, or return; he shall be guilty of felony without benefit of clergy. *En. st. 35 El. c. 2. s. 8, 9, 10.*

Abjure.] The form whereof, according to the ancient books, is this: This bear you, sircoroner, that I. A. O. of ——— in the county of ——— am a popish recusant, and in contempt of the laws and statutes of England, I have and do refuse to come to their church: I do therefore, according to the intent and meaning of the statute made in the 35th year of queen Elizabeth, late queen of this realm of England, abjure the realm of England. And I shall haste me towards the port of P. which you have given and assigned to me, and that I shall not go out of the highway, leading thither, nor return back again; and if I do, I will that I be taken as a felon of the king. And that at P. I will diligently seek for passage, and I will tarry there but one flood and ebb, if I can have passage: and unless I can have it in such space, I will go every day into the sea up to my knees, assaying to pass over. So help me God and his doom. Stam. 116. Mir. b. 1. Offic. Cor. 49.

5. But if such person restrained shall be urged by process, or be bound to appear in any of the king's courts, or be sent for by the council, or be bound to render his body to the sheriff on proclamation, he shall incur no penalty for removing for such purpose. *En. st. 35 El. c. 2. s. 13, 14.*

6. Also, popish recusants confined to their habitations by the 35 *El.* may be licensed to remove.

(1) By the king.

(2) By three or more of the privy council, in writing under their hands; who may give licence to such recusant to travel out of the compass of five miles,

miles, for such time as shall be contained in his licence, for their travelling, attending, and returning, and without any other cause to be expressed in the licence.

(3) If such recusant shall have necessary occasion or business; then, upon licence in writing under the hands and seals of four of the next justices of the county or place, with the assent in writing of the bishop; or of the lieutenant, or a deputy lieutenant of the county residing therein, under their hands and seals; in which licence shall be specified both the cause of the licence, and the time how long the party licensed shall be absent in travelling, attending, and returning: In such case, the person so licensed may travel about such his necessary business, and for such time as shall be comprised in the licence; he first taking oath before the said four justices, or any of them, that he hath truly informed them of the cause of his journey, and that he shall not make any causeless stay. And such person departing above five miles, not having such licence, and not having taken such oath, shall incur the penalty of the 35 *El.* abovementioned. 3 *J. c. 5. s. 7.*

XII. Shall not teach school.

By the act 7 *W. 3. c. 4.* No person of the popish religion, shall publicly teach school, or instruct youth, or in private houses teach or instruct youth, except only the children or others under the guardianship of the master or mistress of such private family, upon pain of twenty pounds, and also being committed to prison for three months for every such offence. *s. 9.*

And by the 8 *Ann. c. 3.* Whatsoever person of the popish religion shall publicly teach school, or shall instruct youth in learning in any private house, or shall be entertained to instruct youth as usher, under master or assistant, by any protestant schoolmaster, he shall be esteemed to be a popish regular clergyman, and be prosecuted as such, and incur such penalties and forfeitures as any popish regular convict is liable unto by the laws. *s. 16.*

It shall be lawful for any two justices of the peace, whereof one to be of the *quorum*, by warrants directed to any constable to summons any popish person of the age of sixteen years or upwards to appear before such justices at a certain time and place in the warrants to be expressed, within three days after the date of the said warrants, so that the said place of appearance be not above five miles from the habitation of the said person. *s. 21.*

And if the person so summoned shall neglect to appear accordingly, or appearing shall refuse to give his testimony upon oath touching the residence and abode of any popish schoolmaster, tutor, usher, undermaster, or assistant to any protestant schoolmaster, who may be disguised, concealed, or itinerant in the country, and also fully answer to all such circumstances and things touching such popish persons offending contrary to this and the former act *to prevent the further growth of popery*, such persons so refusing or neglecting to appear or to answer, shall be committed by the said justices to the common gaol for twelve months, unless he or she shall pay down a sum not exceeding twenty pounds. *Ibid.*

XIII. Marriages

XIII. Marriages by popish priests.

1. By the act 12 G. 1. c. 3. If any popish priest or reputed popish priest, or person pretending to be a popish priest, shall celebrate, or take upon him to celebrate any marriage between two protestants or reputed protestants, or between a protestant or reputed protestant and a papist, such popish priest or reputed popish priest, shall be guilty of felony without benefit of the clergy or of the statute. *f. 1.*

2. It shall be lawful for any two justices of the peace, by warrants under their hands and seals directed to any constable, to summon persons suspected to be married by such popish priest, or to have been present at the celebration of such marriage, to appear before such justices at the time and place in such warrant mentioned, not being more than ten miles distant from their usual place of abode, and to examine such persons upon oath, where and by what persons, and with what form and ceremonies such marriage was celebrated, and what religion the persons so married professed, and who were present at such marriage. *f. 2.*

3. If the persons so summoned shall neglect to appear according to such summons, or shall refuse to be examined as aforesaid, or after examination shall refuse to enter into a recognizance to prosecute at the next assizes, such as shall appear by such examination to have offended contrary to this act, such persons so neglecting to appear, having no lawful impediment, or refusing to be examined, or to enter into recognizance as aforesaid, shall be committed by the said justices to the common gaol for three years. *f. 3.*

Unless they shall sooner submit to be examined before the said justices, or one of them, or in case of their absence or refusal before some other justice, and shall enter into a recognizance to appear at the next general assizes to be held for the county where the offence was committed, to prosecute such persons as shall appear by such examination to have offended contrary to this act, in which case it shall be lawful for such justice of the peace, by warrant directed to the gaoler to discharge such persons from their commitment.

4. And by the 19 G. 2. c. 13. Every marriage that shall be celebrated after the first day of May 1746, between a papist and any person who hath been or hath professed him or herself to be a protestant at any time within twelve months before such celebration of marriage, or between two protestants if celebrated by a popish priest, shall be absolutely null and void without any process, judgment, or sentence of law whatsoever. *f. 1.*

5. Also, by the 23 G. 2. c. 10. Every popish priest or reputed popish priest, who after the first day of May 1750, shall celebrate any marriage contrary to the act 12 G. 1. c. 3. and be thereof convicted, such popish priest shall be guilty of felony without benefit of clergy or of the statute, although the marriage so celebrated by such popish priest be declared null and void by the act 19 G. 1. c. 3. *f. 3.*

XIV. *Burying in suppressed monasteries.*

By the act 9 *W. 3. c. 26.* No person shall bury any dead in any suppressed monastery, abbey or convent, that is not made use of for celebrating divine service according to the liturgy of the church of *Ireland*, by the law established, or within the precincts thereof, upon pain of forfeiting ten pounds; which sum may be recovered from any persons that shall be present at such burial, and offending contrary to this act; which forfeitures every justice of the peace in their respective counties, are hereby authorized to hear and determine; one moiety of which forfeiture for burying contrary to this act, shall be by such justice given unto the informer, and the other moiety to the minister and churchwardens of the parish where any such offences shall be committed, to be disposed of for the use of the parish. *s. 6.*

XV. *Popish pilgrimages.*

1. By the act 2 *Ann. c. 6.* Whereas the superstitions of popery are greatly increased and upheld by the pretended sanctity of places, especially of a place called *Saint Patrick's purgatory* in the county of *Donegal*, and of wells to which pilgrimages are made by vast numbers at certain seasons, all such meetings and assemblies shall be adjudged riots and unlawful assemblies, and punishable as such in all persons meeting at such places. *s. 127.*

2. And all sheriffs, justices of the peace and other magistrates, are required to be diligent in putting the laws against offenders in due execution.

3. All persons assembling at *Saint Patrick's purgatory*, or at any well or place contrary to this act, and who shall be thereof convicted by their own confession, or by the testimony of one sufficient witness upon oath, before any justice of the peace, or mayor, or other chief magistrate of any city or corporation where the offence shall be committed, or the party offending apprehended, shall forfeit ten shillings, to be paid at such time as by the justice or chief magistrate shall be appointed, the one moiety thereof to such persons who shall give information of the said offence, and procure such offenders to be convicted, the other moiety to be disposed of to the poor of the parish where such offender shall be convicted. *s. 128.*

4. And if such offenders shall neglect or refuse to pay the said sums, to be assessed as aforesaid, then the said justices or chief magistrate shall commit such offenders to some constable or other inferior officer, where the offence shall be committed or the party apprehended, to be publicly whipped, which punishment the said constable or other inferior officer, is required to execute upon such offender pursuant to the order within twenty four hours after such order received.

5. And all persons who at such assemblies build booths, sell ale, victuals, or other commodities, and shall be thereof convicted by the view of any justice of the peace of the same county, or of any chief magistrate within such town wherein the same shall be, or by confession of the party, or by the oath of one credible witness before such justice or chief magistrate, shall forfeit twenty shillings, to be levied by distress and sale of the goods of such offender,

fender, and in default of distress, by the imprisonment of the offender till payment thereof.

6. All the said penalties of twenty shillings to be applied to the service of the public in such manner as the justices of the peace for the said county at their quarter-sessions shall appoint; and all the said magistrates are required to demolish all crosses, pictures and inscriptions that are any where publickly set up, and are the occasions of any popish superstitions.

XVI. *Arms of papists.*

1. By the act, 7 W. 3. c. 5. It shall be lawful for any two justices of the peace, and to all mayors, sheriffs, and chief officers of cities and towns corporate, in their liberties, by themselves, or by warrants under their hands and seals respectively, to search for and seize all such arms, armour, and ammunition of *papists*, or in the hands of any persons in trust for them, &c. as shall be concealed in any house, lodging, or other places where they shall suspect any such shall be concealed. *f. 1.*

2. And such arms, &c. so seized, shall, by the persons seizing the same, be preserved for the use of his majesty; and the said persons shall return a particular account thereof to the lord deputy or chief governors, to the end the same may be brought into his majesty's stores, or be disposed of as they shall think fit.

3. No such searches shall be made in any houses or lodgings, save only between the rising and setting of the sun, other than in cities and their suburbs, towns corporate, market-towns, and houses of such cities and towns, if it shall be so thought necessary, and the warrants for that purpose do direct. *f. 2.*

4. And in case such justices of the peace, or other chief magistrate after such search made, shall find cause to suspect that any arms or ammunition remain concealed and not seized as aforesaid, they are required to cause such persons whom they shall suspect to have concealed the same, to be brought before them, and to be examined upon their oath concerning the same.

5. Every papist who shall have or keep any arms or ammunition, and every person who wittingly shall have any arms or ammunition, to the use of or in trust for any such papist, contrary to the intent hereof. *f. 3.*

6. And every person who upon demand or search made for such arms, &c. shall refuse to declare to the justices, mayors, or other persons empowered for seizing and searching for such arms and ammunition, what arms and ammunition they or any other to his knowledge or with his privy have, or shall hinder the delivery thereof to any the said justices, or any other persons authorized by warrant as aforesaid to search for and seize the same; and every person who shall refuse to make discovery upon their oath, to be administered by such justices or chief officer of any city or town corporate as aforesaid, or being summoned by warrant under the hands of two justices, whereof notice in writing to be given to him or her, or left at his or her usual place of abode, shall, without reasonable cause neglect to appear to be examined as aforesaid, every person so offending shall forfeit, if such person be a peer or peers, for the first offence one hundred pounds sterling. *f. 3.*

And

And if such persons shall offend a second time, then such persons shall incur a *premunire*. and being thereof convicted shall suffer punishment accordingly.

7. If such persons offending shall be under the degree of a peer or peers, they shall for the first offence, being thereof convicted upon any indictment or information at the assizes or quarter-sessions for the county where such offence shall be committed, forfeit thirty pounds, and shall suffer imprisonment by order of the justices of assize at the assizes, or justices of the peace in their general quarter-sessions for one year, and until they shall pay the penalty aforesaid.

And if such persons shall offend a second time, such persons shall for such second offence, being convicted of the first offence, incur the penalties of persons attainted in a *premunire*.

8. Provided, that the lord deputy or chief governors and privy council, may, by order of privy council, license any persons to keep such arms as shall be particularly expressed in such licence, in as ample manner as such chief governors might have done before the passing of this act, which licence shall be granted without any fee other than one shilling for the writing thereof. *f. 4.*

9. And by the 13 G. 2. c. 6. All justices of the peace, magistrates, and chief officers of cities and towns corporate, shall exercise all the powers in the act 7 W. 3. c. 5. in such manner as is therein directed.

10. And all papists shall discover and deliver up to some justice of the peace, or to the magistrate or chief officer of the county, city, town-corporate, or place where such papist or other persons mentioned in the said act shall respectively reside, all arms, armour, and ammunition, which are in their possession or power, or in the custody of any persons to their use, or in trust for them, or at their disposition, notwithstanding any licence for keeping the same heretofore granted. *f. 1.*

11. And all such persons as are by this or any other law declared or are to be deemed to be papists to any purpose whatsoever, shall within the space of fourteen days after they shall knowingly get or have any arms, armour, or ammunition, discover and deliver up to some justice of the peace, or to the magistrate or chief officer of the county or place where such papist or such other persons shall reside, all their arms and ammunition that shall be in their possession or power, or in the custody of any persons in trust for them, or at their disposition, except such arms as the chief governors and privy council shall by licence authorize any papist to have.

12. Every papist and other person as aforesaid, who shall have, keep, or use any arms or ammunition, not being licensed, or who shall not deliver up the same in manner as aforesaid. *f. 2.*

(2) And all persons who knowingly shall have any arms or ammunition, to the use of or in trust for any papist, or for any such other person as aforesaid.

(3) And all persons, who upon demand or search made for arms and ammunition, according to the direction in this or the said former act, shall conceal, refuse, or neglect to discover and give up to the persons authorized by the said former act, to search for, seize, and demand the same, all such arms and ammunition as they, or any persons in trust for them, shall

shall have, or shall oppose, or in any wise disturb any persons so impowered, to search for and seize the same.

(4) And all persons, who being summoned in writing, signed by any two justices of the peace, or by the magistrate or chief officer of any county, city, or town-corporate, where the person so summoned shall then reside, whereof notice in writing shall be given to them, or left at their usual place of abode, shall without reasonable cause refuse or neglect to appear before such justices, magistrate, or chief officer, to be examined as aforesaid.

(5) And all persons who shall refuse to be examined upon their oath when thereto required, by any two justices of the peace, or by the magistrate or chief officer of any county, city, or town-corporate, concerning the discovery and delivery of such arms and ammunition.

Every such person so offending in any of the matters aforesaid, if such person be a peer or peers of this realm, he or she being thereof convicted at the assizes, or at the quarter-sessions of the county or county of the city of *Dublin*, where the said offences shall be committed, for the first offence shall forfeit three hundred pounds.

And every person under the degree of a peer or peers so offending, shall, for the first offence, being thereof convicted in manner aforesaid, forfeit fifty pounds, and shall suffer imprisonment by order of the said justices for one year, and until he or she shall have paid the said penalties.

And every person so convicted, who shall offend a second time in the premises, being thereof convicted in manner aforesaid, shall incur all the penalties and forfeitures of a person attainted in a *premunire*; and the said respective sums of three hundred pounds and fifty pounds so forfeited, shall go one moiety thereof to his majesty, and the other moiety to such persons prosecuting to conviction such offender, according to the direction of the justices before whom any such offender shall be convicted.

13. Nothing herein contained shall extend to subject any papist, or such other person as aforesaid, to any penalty or forfeiture for concealing arms or ammunition, who shall voluntarily before any information given, discover and deliver up all his or her arms or ammunition to some justice of the peace or chief magistrate. *f. 3.*

14. No person shall be convicted, or incur any penalty upon this act, for any offence committed contrary thereto, upon any confession or discovery he or she shall make, being examined upon oath, nor shall any such examination be given in evidence against the person so examined, unless such person shall be indicted for having committed wilful perjury in such examination. *f. 5.*

15. When any person shall be prosecuted for any the offences aforesaid, the justices before whom such prosecution shall be then depending, shall tender to every such person so prosecuted the oath of abjuration, and the oaths and declaration in the said act set forth; and if any such person to whom such tender shall be made, do refuse to take the said oaths, and repeat the said declaration, such refusal shall amount to full proof, that such person is a papist, and was so at the time of the offence committed. *f. 6.*

16. Provided, that though the person to whom such tender shall be made shall take the said oaths and repeat the said declaration, and subscribe the same, yet it shall be lawful for the persons who shall prosecute to give evidence

dence that the person prosecuted at the time of the offence committed was a papist, or other such person as aforesaid. *s. 7.*

17. If any of the people called *Quakers* shall be charged with any of the offences aforesaid, upon proof that such person hath been one of the people called *Quakers*, by producing and proving a certificate under the hands and seals of six credible men of his or her congregation, owning him or her to be one of them, and two of the subscribers appearing beefore any justices before whom such *Quaker* shall be tried, such justices shall not tender to such *Quaker* the said oath and declaration, but in the room thereof, shall tender to such *Quaker* the declarations provided for *Quakers*, by an act 8 *Ann. for explaining and amending an act to prevent the further growth of popery. s. 8.*

18. The sheriffs of every county at every assizes, commission of *oyer and terminer*, and at every quarter-sessions in the county of *Dublin*, and county of the city of *Dublin*, shall return in calendar to the justices of assize, commissioners of *oyer and terminer*, or justices of the peace in the county of *Dublin*, and county of the city of *Dublin*, all persons who have been convicted in pursuance of this act, who have not paid the fine imposed, on pain of forfeiting for every such omission ten pounds, to be recovered in a summary way by civil bill to the use of the informer. *s. 9.*

19. As often as any person so convicted shall not pay the fine imposed pursuant to this act, within one calendar month after his or her years imprisonment shall be expired, whereby the persons discovering and convicting such offenders; may lose the reward hereby intended for them, the persons so discovering and convicting such offenders, shall receive ten pounds for every offender so convicted as aforesaid, to be given or distributed to such persons prosecuting to conviction such offender, according to the direction of the justices before whom such offender shall be convicted. *s. 10.*

20. Which sum the grand jury, who shall present such offender to be insolvent as aforesaid, shall present to be levied on the popish inhabitants of the county, county of the city or of the town wherein such offender shall be convicted; and the same shall be raised and paid to the persons hereby intitled to the said sum, by such means, and in such manner as money is usually levied for the reimbursing persons robbed of money or goods by robbers.

21. The justices of the peace shall at the midsummer quarter-sessions yearly, issue their warrants signed by the justices who hold the said sessions, and under the seal of the chairman of every such sessions, therein commanding and authorizing all high and petty constables within their respective divisions, and any two other persons in each barony, whom they shall think fit to appoint, to search according to the direction in the said former act, for arms and ammunition, in the possession of all papists or other such persons as aforesaid. *s. 11.*

And the chief magistrate of every city and town-corporate, not being a county of a city or county of a town, or his deputy, shall once in a year issue his warrant to the constables of such city or town, to search in manner aforesaid; and the chief magistrate or his deputy neglecting to issue such warrant in manner aforesaid, shall for every such neglect forfeit ten pounds.

And

And every high constable neglecting or refusing to execute such warrant, shall forfeit five pounds, and every petty constable neglecting or refusing to execute such warrant, shall forfeit twenty shillings.

All which forfeitures shall be sued for by civil bill at the assizes or at the quarter-sessions where there are not any assizes held for the said counties or cities, where such chief magistrates, high and petty constables as aforesaid respectively reside, by any person who shall sue for the same; and such process, decree and execution shall issue as is usual in civil bills, which penalties so recovered, together with costs of suit, shall be to the use of the person so suing.

If any justice shall, after due information upon oath made before him, of any arms and ammunition being concealed by or in the possession of any papist, or other such person as aforesaid, refuse or neglect to cause search to be made for such arms within a reasonable time after such information, every such justice shall for every such refusal or neglect, forfeit twenty pounds, to be recovered by civil bill in manner aforesaid. *f. 12.*

22. Nothing herein contained shall extend to abridge the power of any two justices of the peace within the limits of their jurisdiction, or of the mayors, sheriffs, and chief officers of cities and towns corporate in their respective liberties, by themselves, or by warrants, whenever they shall judge it necessary, to search for and seize, according to the directions in this and the said recited act, all arms, &c. which shall be in the possession of any papist, or other such person as aforesaid, or in the hands of any persons in trust for them, or at their disposal, or that shall be concealed in any house or other place where they shall suspect any such arms to be concealed. *f. 13.*

23. Where any protestant servant by the direction or privity of his master, being a papist, or other such person as aforesaid, shall carry or keep any arms in his custody, such master shall be deemed as if he actually carried or kept such arms, and shall suffer the penalties by this act inflicted on papists, or other such person as aforesaid who shall carry arms, and such servant shall be subject to the penalties inflicted by this act, in the same manner as if he was a papist. *f. 15.*

24. All prosecutions for any offence against this act shall be commenced within one year after the offence committed; and if such prosecution shall be commenced after the end of the said year, the same shall be void. *f. 16.*

25. Every person professing the protestant religion, who shall educate, or suffer to be educated, any of their children under the age of fourteen years in the popish religion, shall be deemed a papist to all purposes of this act. *f. 17.*

26. The said act passed in the seventh year of King *William* the third, for the better securing the government by disarming papists, so far as the same is not altered by this or some other act, shall be deemed to be a perpetual law, and that the same was so intended at the making thereof; and all justices of assize and oyer and terminer, shall give this and the said former act in charge, as often as any of them shall give a charge to the grand jury. *f. 20.*

XVII. *Horses of papists.*

1. By the act 7 *W.* 3. c. 5. No papist shall be capable to have or keep in his possession, or in the possession of any other person to his use or at his disposition, any horse, gelding, or mare, which shall be of the value of five pounds. *f.* 9.

And if any protestant shall make discovery upon oath of any such horses to be in the possession of such papist, or of any person in trust for him, to any two justices of the peace, or to the chief magistrate of any city or town corporate, such justice or chief magistrate shall by warrant authorize such person with the assistance of the constable, or such other person as they shall think fit, who are required to be assisting therein, in the day time only, to search for and secure all such horses, and in case of resistance to break open any door and bring such horses before them.

And such protestant making such discovery, paying or making tender before such justices or chief magistrate of five pounds five shillings to the owner or possessor of such horse, or to such justice or chief magistrate in their absence, which the said justice or chief magistrate are authorized to receive for the use of such owner or possessor.

After such payment or tender and refusal, the property of such horses for which such sums shall be respectively tendered or paid, shall be vested in the person making such discovery and tender as if such horses had been bought and sold in market overt; and the said justices or head officer are required by warrant to cause such horses to be delivered accordingly.

This clause is not to extend to stud-mares or stallions. See Par. 5.

2. If any person shall conceal or be aiding in the concealing any such horses belonging to any papist, or suspected papist refusing to take the oaths and subscribe the declaration aforesaid, such persons being thereof convicted by the oaths of two credible witnesses, before any justice of the peace of the county where such horses shall be concealed, shall be committed to the common gaol three months, and shall forfeit to his majesty treble the value of such horses, to be settled by the justices in their quarter sessions, who are authorized to continue such person in prison until payment of such sum. *f.* 10.

3. Every person shall be deemed a papist within the meaning of this act, who shall refuse to take the oaths and subscribe the declaration before mentioned when the same shall be tendered to him by any justice of the peace, which oaths and declaration the said justices of the peace and chief magistrates are required to administer, if any such persons shall deny themselves to be a papist within the meaning of this act.

And if any such persons shall take the said oaths and subscribe the said declaration, the said justices shall certify their taking the said oaths, and return the said declaration to the next quarter sessions, there to be recorded.

4. If any justices or chief magistrates shall neglect or refuse to execute any powers which they are required by this act to put in execution, every such

such justice or chief magistrate or officer shall for every such default forfeit fifty pounds, to be recovered in any court of record, by bill, &c. wherein no essoign, &c. shall be allowed; the one moiety to his majesty, and the other to such person as shall sue for the same.

And the said offenders shall be incapable, after being convicted, to act as justice of the peace or chief magistrate, or officer in any county, city, or town corporate.

5. But by the 8 *Ann. c. 3.* No stud-mare kept for breeding only, nor stallion kept as such and for no other use, shall be deemed to be within the intention of the act 7 *Will. 3. cap. 5. for the better securing the government by disarming papists*, but every papist and reputed papist may keep such stud-mares and stallions, and the breed and produce thereof under the age of five years, and not otherwise. *f. 36.*

Nothing in this act shall extend to the hindering the lord lieutenant or other chief governors of this kingdom from seizing and securing any horse belonging to any papist or reputed papist, upon any invasion likely to happen, or in any case of intestine war broke out, or likely to break out.

6. In case the lord lieutenant or chief governors shall order any horse or mare so seized, to be delivered back to the owner, it shall be lawful for every person having or keeping such horse or mare in his custody by virtue of the authority aforesaid, to keep or detain the same, until the owner or person from whom the same was taken shall pay six pence for every night the said person did keep any such horse or mare, by virtue of the authority aforesaid. *f. 37.*

XVIII. Tendering the oaths to papists.

1. By the act 8 *Ann. c. 3.* It shall be lawful for any two justices of the peace, by warrants under their hands and seals directed to any sheriff, constable, or other officer, to summon any man of the age of sixteen years or upwards to appear before such justices, and take and subscribe the oath of abjuration. *f. 24.*

2. And if the person so summoned shall neglect or refuse to appear, not having some lawful impediment, or appearing shall refuse to take and subscribe the said oath, being tendered to him by the said justices, it shall be lawful for such justices to commit such person to the common goal or house of correction for three months, or until he shall take the said oath, unless the said offender shall pay down to the justices a sum not exceeding forty shillings, as the said justices shall require; which money shall be paid to the church-wardens or overseers of the poor of such parish or place where such offender shall reside, and shall be for ever incapable of obtaining or having any licence to carry or keep any arms, and such licence, if obtained, is declared to be void.

3. And after three months after such default or refusal, it shall be lawful for two justices to direct their warrants as aforesaid, to summon such offender to appear before them to take and subscribe the said oath.

4. And if the said offender shall neglect or refuse to appear accordingly, or shall appear, and upon tender of the said oath refuse to take and subscribe the same, it shall be lawful for the said justices to commit the said offender to gaol for six months, unless the said offender

offender shall pay down a sum not exceeding ten pounds, nor under five pounds, as the said justices shall require, to be disposed of to the relief of the poor as aforesaid, and the offender to be bound with two sufficient sureties, with condition to appear at the next assizes or gaol delivery for the county wherein such offender shall reside, or at the general quarter-sessions of the peace in the county, and county of the city of *Dublin*, if he shall be an inhabitant of the said county, or county of the said city, and in the mean time to be of the good behaviour.

5. At which assizes or quarter-sessions the said oath shall be tendered to the said offender by the justices of assize in their open assizes, or by the justices at their general quarter-sessions in the said county, and county of the city of *Dublin*; and if the offender shall refuse to take and subscribe the said oath, he shall incur the penalties of *præmunire* exprest in the statute made in the sixteenth year of *Richard* the second.

6. Provided, that protestant dissenters called *quakers*, who scruple the taking any oath, producing a certificate under the hands and seals of six or more credible men of their society owning him to be one of them, and two of the subscribers appearing with the person for whom they certify before any justice or magistrate who shall require the same, and he making and subscribing the declaration (*See Tit. Oaths.*) shall be exempted from the several fines and penalties mentioned in this said act. *s. 25.*

Note, the declaration against transubstantiation and the abjuration, are both required to be taken by this clause.

Præmunire.

What it is.

1. **P**RÆMUNIRE is so called from a word in the writ, *Præmunire facias præfatum A. B. quod tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, to warn the person to appear, as is directed in the statute of 27 *Ed. 3. c. 1.* hereafter following. 1 *Inst.* 129.

Power of justices of the peace therein.

2. Notwithstanding that *præmunire* is not within the letter of the commission of the peace, yet inasmuch as it is against the peace of the king and of the realm, any justice of the peace may, either on his own knowledge, or the complaint of others, cause any person to be apprehended for such offence; and he may take the examination of the person so apprehended, and the information of all who can give material evidence against him, and put the same in writing, and bind over the witnesses to the king's bench or gaol delivery; and certify his proceedings to the same court to which he shall bind over such informers. 2 *Haw. 39. Hale's Pl. 168.*

Impeaching judgments in the king's courts, a præmunire.

3. By the 27 *Ed. 3. c. 1.* called the statute of provisors, They who shall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or which do sue in any other court, to defeat or impeach the judgments given in the king's courts, shall have a day, containing the space of two months, by warning to be made to them, by the sheriffs or other officers, to appear to answer in their proper persons for the contempt: And if they come not at the said day in their proper person to be at the law, they, their procurators, attornies, executors, notaries, and maintainers, shall from

from that day forth be put out of the king's protection, and their lands, goods, and chattels forfeit to the king, and their bodies wheresoever they may be found shall be taken and imprisoned, and ransomed at the king's will. And upon the same a writ shall be made, to take them by their bodies, and to seize their goods, lands and possessions, into the king's hands. And if it be returned, that they be not found, they shall be put in exigent, and outlawed.

4. And by the 16 R. 2. c. 5. commonly called the statute of *præmunire*, Suing out foreign process, a præmunire. and to which the several subsequent statutes do refer; both those who pursue, or cause to be pursued, in the court of *Rome*, or elsewhere, any processes or instruments, or other things whatsoever which touch the king, against him, his crown and regality, or his realm; and also those who shall bring, receive, notify, or execute them; and their fautors and abettors, shall be out of the king's protection; and their lands and tenements, goods and chattels, forfeit to the king; and they shall be attached by their bodies, if they may be found, and brought before the king and his council, there to answer; or process shall be made against them by *præmunire facias*, in manner as it is ordained in other statutes of provisors.

And in these two statutes, as above recited, are contained the pains and penalties of what is called a *præmunire*.

5. And since these acts it hath been adjudged, that a suit in the ecclesiastical court (as for debt) was in case of *præmunire*. And that a person suing in the ecclesiastical court, for the forgery of a will, doth incur the danger of a *præmunire*; because the party grieved might have his remedy by the common law. Also judgment against the defendant was given in a *præmunire*, for suing for tithes in the ecclesiastical court, alledging the same to be severed from the nine parts. *3 Inst.* 120, 121. But it seemeth, that a suit in that court, for a matter which appears not by the libel itself, but only by the defendant's plea, or other matter subsequent, to be of temporal cognizance, is not within the statute; because it appears not that either the plaintiff or judge knew it to be so. *1 Haw.* 51, 52. Suing for temporal matters in the spiritual court, a præmunire.

6. The judgment in *præmunire* is, that the defendant *shall be from thenceforth out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king, and that his body shall remain in prison at the king's pleasure.* *1 Inst.* 129. Judgment in præmunire.

Out of the king's protection] So odious was this offence formerly, that a man who was attainted of the same, might have been slain by any one without danger of law: because it was provided by law, that a man might do to him as to the king's enemy, and a man may lawfully kill an enemy: and therefore by the 5 *El.* c. 1. it is enacted, that it shall not be lawful for any one to slay any person attainted in or upon a *præmunire.* *1 Inst.* 130.

But he is so far out of the king's protection, that he is disabled to bring an action for any injury whatsoever. And no one, knowing him guilty, can with safety give him aid, comfort, or relief. *1 Inst.* 129, 130. *1 Haw.* 55.

And Mr. *Hawkins* says it has been questioned, whether he hath a right to demand surety of the peace. But *Lambard* and *Dalton*, which are the authority he cites for it, do incline to think that he hath such right. *Lambard* alledges for it the statute of the 5 *El.* abovementioned; and *Dalton* asserts it without doubting. *Lamb.* 80. *Dalt.* 272. *1 Haw.* 126.

Lands

Lands and tenements——forfeited] Yet tenant in tail shall only forfeit lands during life : for albeit the statute of the 16 R. 2. c. 5. enacteth, that lands and tenements shall be forfeited, that must be understood of such an estate as he may lawfully forfeit, and that is, during his own life. 1 Inst. 130.

Corruption of blood.

7. Attainder in præmunire worketh no corruption of blood. 1 Inst. 391.

Presentment.

A Presentment is that which the grand jury find and present to the court, without any indictment delivered to them; which is afterwards reduced into the form of an indictment, and in nothing else differs from an indictment.

There are other presentments of churchwardens, constables, surveyors of the highways, and justices of the peace; all which may be seen under their proper titles.

Prison-breaking.

IT seemeth that at the common law all prison breaches were felonies, if the party were lawfully in custody for any cause whatsoever. 2 Haw. 123.

But by the following statute, which is called the statute *de frangentibus prisonam*, the severity of the common law is moderated; in the explication of which statute, will be contained the whole learning relating to this subject.

The statute is this: *Concerning prisoners which break prison, the king will-eth and commandeth, that none that breaketh prison shall have judgment of life or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon, according to the law and custom of the realm.* 1 Ed. 2. st. 2.

Concerning prisoners which break] Therefore if the prison be broken by a stranger, and not by the prisoner, or by his procurement, this is no felony in the prisoner. *Hale's Pl.* 108.

Which break prison] It seems clear, that any place whatsoever, wherein a person under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or street, or in the common gaol, or the house of a constable, or private person, is properly a *prison* within this statute; for imprisonment is nothing else but a restraint of liberty. 2 Haw. 124.

And therefore this extendeth as well to a prison in law, as to a prison in deed. 2 Inst. 589.

But there must be an actual *breaking*; for if the door be open and he goes out, it is not felony, but a misdemeanor only. 2 Inst. 589. 2 Haw. 125.

But if the prison be fired without the privity of the prisoner, he may lawfully break it to save his life. *Hale's Pl.* 108.

Also

Prison-breaking.

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Also it seems that no breach of prison will amount to felony, unless the prisoner escape. 2 Haw. 125.

That none that breaketh prison shall have judgment of life or member] That is, shall be guilty of felony. But nevertheless he is still punishable as for a high misprison, by fine and imprisonment; for it cannot be thought the meaning of the statute, in ordaining that such offences shall not be punished as capital ones, to intend, that they shall not be punished at all. 2 Haw. 128.

Nevertheless, by the 3 Ed. 1. c. 15. Those who have broken prison are not *bailable* by justices of the peace; and that for two reasons: 1. Because it carries a presumption of guilt. And, 2. Because it is a superadded offence to the former for which they stood committed. 2 H. H. 133.

Except the cause for which he was taken and imprisoned, did require such judgment] This is to be intended of a *lawful* cause; and therefore *false imprisonment* is not within this act. 2 Inst. 590.

Imprisonment is a restraint of a man's liberty under the custody of another, by lawful warrant, in deed, or in law. Lawful warrant is, either when the offence appeareth by matter of record, as when the party is taken upon an indictment; or when it doth not appear by matter of record, as when a felony is done, and the offender by a lawful *mittimus* is committed to gaol for the same: But between these two cases there is a great diversity; for in the first case, whether any felony were committed or no, if the offender be taken by force of a *capias*, the warrant is lawful, and if he break prison it is felony, altho' no felony were committed; but in the other case, if no felony be done at all, and yet he is committed to prison for a supposed felony, and break prison, this is no felony, for there is no *cause*. 2 Inst. 590.

So that the cause must be just, and not feigned, for things feigned require no judgment: Thus if a man give another a mortal wound, for which he is committed to prison, and breaketh prison, and the other dieth of the wound within the year, this death hath relation to the stroke; but because relations are but fictions in law, and fictions are not here intended, this prison-breaking is not felony. 2 Inst. 591.

So that the offence for which the party was imprisoned, must be a capital one at the time of the offence, and not become such by a matter subsequent. 2 Haw. 126.

And the cause must be expressed in the *mittimus*, altho' not so certainly as in an indictment, yet with such convenient certainty as it may appear judicially that the offence requireth such judgment; as, not for felony generally, but for felony in stealing such a horse, and the like. 2 Inst. 591.

But if the offence for which the party is committed, be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain, that the breaking of the prison, or a commitment for it, can be felony; for the words of the statute are, *except the cause for which he was taken and imprisoned did require such judgment*; and here it appears, that the offence, which is the cause of his imprisonment, doth not require such a judgment. 2 Haw. 126.

But if a man be committed by lawful warrant, for *suspicion* of felony done,
if

Prison-breaking.

if he break prison, he may be indicted for that escape, albeit the commitment be for suspicion of felony, and yet no judgment can be given against him for suspicion, but for the felony itself, whereof he is suspected. 2 Inst. 592.

And an indictment that such a person *feloniously broke the prison* generally, is not good; but it ought to rehearse the specialty of the matter, that he being imprisoned for such or such a felony, broke the prison. 2 Inst. 591.

But if the party be only arrested for, and in his *mittimus* charged with a crime which doth not require judgment of life or member, as petit larceny, or homicide by self defence or by misadventure, and the offence be in truth no greater than the *mittimus* doth suppose it to be, it is clear, from the express words of the statute, that a breaking of the prison cannot amount to felony. 2 Haw. 126.

But if a felony be made by a subsequent statute, and an offender is committed thereupon; if he breaks prison, it is felony. For since all breaches of prison were felonies by the common law, which is restrained by this statute in respect only of imprisonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so. Ha. Pl. 108. 2 Haw. 126.

Also it is said, that the party may be arraigned for prison-breaking, before he be convicted of the crime for which he was imprisoned; for that it is not material whether he were guilty of such crime or not; for the words of the statute are, *for which he was taken and imprisoned*. 2 Haw. 127.

But if he is first indicted and acquitted of the principal felony, he shall not be indicted for the breach of prison afterwards; for it being cleared that he was not guilty of the felony, he is in law as a person never committed for felony, and so his breach of prison is no felony. 1 H. H. 612.

But the gaoler shall not be punished as a felon for the party's breach of prison, unless he voluntarily consented to it; but it seems to be a negligent escape in the gaoler, for which he may be punished by fine and imprisonment, because there wanted either that due strength in the gaol, or that due vigilance in the gaoler or his officers, that should have prevented it: and if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 H. H. 601.

And therefore if a criminal endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 Haw. 71.

Indictment for prison-breaking, by escaping from a constable.

THE jurors for our lord the king upon their oath present, that A. C. late of ——— yeoman, constable of our said lord the king in and for the town of ——— in the said county, on the ——— day of ——— in the ——— year of the reign of ——— at ——— within the town and constablewick aforesaid, in the county aforesaid, did take and arrest one A. O. late of ——— labourer, on suspicion of having committed a certain felony, in feloniously taking and carrying away one black gelding, the property of ——— of the value of ——— and thereupon he the said A. O. under the custody of him the said A. C. the constable aforesaid, was brought before J. P. esquire, one of the justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies,

Prison-breaking.

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felonies, trespasses, and other misdemeanors within the said county committed, and he the said J. P. by his warrant directed to the said A. C. and others, did command the said A. C. to carry and convey the said A. O. to the gaol of our said lord the king at — in the county aforesaid, there to be safely kept, until he should be lawfully delivered from thence; by virtue of which said warrant, he the said A. O. was taken and detained by him the said A. C. and as he the said A. C. was conveying and carrying him the said A. O. to the gaol aforesaid, afterwards, to wit, on the — day of — in the year aforesaid, he the said A. O. at — aforesaid in the county aforesaid, with force and arms, did feloniously break away and escape from and out of the custody of him the said A. C. the constable aforesaid, against the will of him the said A. C. and against the peace of our said lord the king, his crown and dignity.

Indictment for breaking out of gaol.

THE jurors for our lord the king upon their oath present, that A. O. late of — in the county aforesaid, labourer, on the — day of — in the — year of the reign of — at — aforesaid in the county aforesaid, was arrested, imprisoned, and detained, in the gaol of our said lord the king, for a certain felony by him committed, that is to say, for the feloniously taking and carrying away one black gelding, the property of — of the value of — and that he the said A. O. on the — day of — in the year aforesaid, with force and arms, the aforesaid gaol of our said lord the king at — aforesaid in the county aforesaid feloniously did break, and thereby did escape from and out of the said gaol, against the peace of our said lord the king, his crown and dignity.

Process.

1. **B**Y the commission of the peace, the justices in sessions have power to *make and continue processes upon indictments, against the persons indicted, until they can be taken, surrender themselves, or be outlawed.* Process by the commission.
2. And by the statute of the 1 Ed. 4. c. 2. Indictments and presentments taken in the sheriff's tourn, shall be delivered to the next sessions, who may award process thereupon, in like form as if they had been taken before themselves. Process on indictments taken in the tourn.
3. And the law also in several cases in express words directs process to be made by justices out of sessions; and in other cases by necessary implication: as where a statute doth give power to justices out of sessions to inquire, hear, and determine, there they may make process to cause the party to come and answer, otherwise they cannot proceed to hear and determine: and this may be either before or after presentment or indictment as the several statutes do require: Before presentment or indictment it is called a *warrant*; after presentment or indictment it is properly called *process*. *Dalt. c. 193.* Process by justices out of sessions.
4. Commonly an indictment, being but an accusation against a man, is of no force but only to put him to answer unto it. And hereof all process hath the name, because it *proceedeth* or goeth out upon former matter either original or judicial. *Lamb. 519.* Process, what.

No need of
process, if the
party is present.

5. And it seemeth plain, from the nature of the thing, that there can be no need of process, where the defendant is present in court, but only where he is absent. 2 Haw. 281.

To be in the
king's name.

6. The process ought to be in the name of the king. And if it issue from the king's bench, it ought to be under the teste of the chief justice; and if it issue from any other court, there seems to be the same reason, that it ought to be under the teste of the first in the commission. 2 Haw. 283.

When return-
able.

7. Upon an indictment in sessions, there must be 15 days between the teste and return of the *venire*, but if the entry be by consent of parties, the *venire* may be returnable *immediate*, and the trial be the same day. 3 Salk. 371.

Process for
felony.

8. Process on an indictment or appeal of death, is one *capias*, and then an exigent: But in the case of any other felony, then by the 22 Ed. 3. c. 14. two *capias*'s, and then an exigent. Hal. Pl. 209. 2 Haw. 303. Crown Circ. 31.

Process under
felony.

9. The ordinary processes upon all indictments of trespass against the peace, or of other offences against penal statutes, not being felony, or a greater offence, are as follows; First, if the offender be absent, a *venire facias*, which is but in nature of a summons to cause the party to appear, shall be awarded, except where other process is directed by some statute. 2 Haw. 283.

If it appear by the return to such *venire*, that the party hath lands in the county, whereby he may be distrained, the *distress infinite* shall be awarded from time to time, till he do appear; and by force hereof he shall forfeit on every default so much as the sheriff shall return upon him in issues. But if a *nihil* be returned on such a *venire*, then three *capias*'s, that is a *capias*, *alias*, and *pluries*, shall issue. 2 Haw. 283.

Where the inhabitants of a parish are indicted or presented, the process is first a *venire*, then a *distringas*. Crown Circ. 21.

Process of in-
formations.

10. By 10 C. 1. ff. 4. c. 11. by which all popular actions on penal statutes are restrained to their proper counties, the like process in every popular action, bill, plaint, suit, or information, on a penal statute, before the quarter sessions (or higher courts) shall be awarded as in an action of trespass *vi & armis* at the common law.

And consequently, the process in all such suits must be by attachment or *pone per vadios*, and after by *distress infinite*, where by the return the party appears to be sufficient, otherwise by *capias*. 2 Haw. 284.

Process on an
escape.

11. If a defendant appear to an indictment of felony, and afterwards before issue joined make an escape, either from his bail, or from prison; the common *capias*, *alias*, and *pluries* shall be awarded against him, unless there had been an *exigent* before, in which case a new exigent shall be awarded. 2 Haw. 285.

Process against
accessaries.

12. The *exigent* shall not be awarded against accessaries, until the principal shall be attainted. 3 Ed. 1. c. 14. 2 Haw. 306.

Process in a
foreign county.

13. By the 8 H. 6. c. 10. On indictments for treason, felony, or trespass, against persons dwelling in other counties than where the indictment is taken, before any exigent awarded, presently after the first writ of *capias* awarded and returned, another writ of *capias* shall be awarded, directed to the sheriff of

of the county whereof the person indicted was supposed to be conversant by the same indictment, returnable before the same justices or others before whom he is indicted, at a certain day, containing the space of 3 months from the date of the said last writ, where the counties are holden from month to month; and where they are holden from 6 weeks to 6 weeks, he shall have 4 months, until the return of the same writ: by which writ of second capias it shall be commanded to the same sheriff to take the person indicted by his body, if he can be found within his bailiwick, and if he cannot be found within his bailiwick, that the said sheriff shall make proclamation in two counties before the return of the same writ, that he which is so indicted, shall appear before the said justices or others, in the county, liberty, or franchise where he is indicted, at the day contained in the said last writ of capias, to answer to the king of the felony, treason, or trespass, whereof he is so indicted: After which second writ of capias so served and returned, if he which is so indicted come not at the day of the same writ of capias returned, the exigent shall be awarded. And every exigent and outlawry otherwise awarded or pronounced shall be void.

And if any such indictment shall be removed by certiorari, then before the exigent awarded, presently after such first capias returned, another writ of capias shall be directed as before, returnable before the king in his bench.

Also if any person be indicted of felony or treason, and at the time of the same felony or treason supposed was conversant within the county whereof the indictment maketh mention, the like process shall be made against the person so indicted, as hath formerly been used; that is, without sending process into the other county.

But every person indicted in the form aforesaid, after he is duly acquitted by verdict, shall have an action upon his case, against the procurer of such indictment; and if such procurer be attainted thereof, the plaintiff shall recover treble damages. Which seemeth to be upon account of the distance at which he is supposed to live, from the place where he is indicted, and consequently his extraordinary trouble in that behalf.

Dwelling in other counties] If the defendant be named of *B.* and late of *C.* there is no need of any *capias* to the sheriff of the county where *C.* lies, because it appears that the defendant is at present conversant at *B.* But if a defendant be named of no certain place at present, but only late of *B.* and late of *C.* and late of *D.* being all of them in counties different from that wherein the prosecution is commenced, a *capias* shall go to the sheriff of every one of those counties. 2 *Haw.* 306.

Shall be void] Not utterly void, but only voidable by writ of error. 2 *Haw.* 306.

Mr. Marrow saith, that by the equity of this statute, if a person, indicted in one county is imprisoned in another, the justices may award an *habeas corpus* to remove him before themselves. *Lamb.* 526.

To be executed
by the sheriff.

14. Concerning the execution of the process, it is laid down as a general rule, that where-ever the king is a party to the suit (as he certainly is to all informations and indictments), the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, whether it have the clause *non omittas* or not, and whether the defendant be within a franchise or in the county at large, for the king's prerogative shall be preferred to any franchise: But it is said, that this is to be intended only where in the grant of the franchise no mention is made of causes to which the king is a party. 2 *Haw.* 284.

Breaking open
doors.

15. And if the party be in an house, if the doors be shut, and the sheriff (having given notice of his process) demand admittance, and the doors be not opened, he may break open the doors and enter to take the offender. 2 *H. H.* 202.

Process on a
sunday.

16. But no person, on the lord's day, shall serve or cause to be served any writ, process, or warrant, order, or judgment (except in cases of treason, felony, or breach of the peace); but the service thereof shall be void, and the person serving the same shall be liable to answer damages to the party grieved, in the same manner as if he had done it without any writ, process, warrant, order, or judgment at all. 29 *C.* 2. c. 7. f. 6.

Process discon-
tinued.

17. It seems to be agreed, that every suit, whether civil or criminal, and also every process in such suit against jurors, ought to be properly continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and the suffering any such gap or chasm is properly called a *discontinuance*; and the continuing the suit by improper process (as by a *capias* instead of a *distringas*), or by giving the parties an illegal day, is properly called a *miscontinuance*; and if the justices, before whom the matter is depending, do not come on the day to which it is continued, it is said to be *put without day*, and cannot be revived without a re-summmons or re-attachment. 2 *Haw.* 298, 300.

Now process may be discontinued several ways. As, 1. Where the second is not tested on the very same day, on which the first is returnable. 2. Where there is a sessions intervening between the teste and the return of a *capias*, that the defendant may not be imprisoned an unreasonable time. But it is no objection to an *exigent*, that it is not returnable the next sessions, because it must allow time for five counties to be holden between its teste and return. 3. Where after issue or demurrer, the court gives the party a day to a distant sessions, without making any continuance to that immediately following. 4. Where the sessions to which the suit is continued is adjourned, and the suit is not adjourned accordingly. 5. Where any of the parties are described in any continuance of the suit, whether on the roll, or by process, by a name or addition variant from those in the original, though only in one letter. 6. Where a *venire* or *distringas* are issued, without any award on the roll to warrant them. 2 *Haw.* 298, 299.

And it seems generally to be taken as an undoubted principle, That a discontinuance by suffering a total chasm in the proceedings, whether on the roll, or in the process, by not giving a fresh continuance instantly upon the determination of the precedent, shall never be aided by any appearance or pleading over: But it is holden by the greater number of authorities, that if the

the original be good, and the defendant present in court, he shall be compelled to answer to such original, let the process whereon he came in, or the execution of it, be never so erroneous or defective, so that it never were discontinued; for the end of process is to compel an appearance, and the end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process, as to let the defendant out of court, in order only to have him brought in again in better form. 2 Haw. 300.

18. The processes (as well of *capias* as of outlawry) may be stayed by a *Process stayed by putting in bail.* *supersedeas* issuing from other justices (out of sessions) testifying that the party hath come before them, and hath found sureties for his appearance to answer to the indictment, or to pay his fine. *Dalt. c. 193.*

And it seemeth that even any one justice may bail persons indicted at the sessions, for any offence under the degree of felony; for that the statutes relating specially to the power of justices in granting bail, do not in this case seem to take away the power, which one justice had before the making of the said statutes. 2 Haw. 103.

19. Judgment of outlawry is given by the coroner, at the fifth county court, upon the party's not appearing to the *exigent* (which is a writ commanding the sheriff to cause the defendant (*exigi*) to be demanded from county court to county court, until he be outlawed). And such judgment is entered thus, *Therefore by the judgment of the coroner of our lord the king of the county aforesaid, he is outlawed.* 2 Haw. 446. *Process of outlawry.*

20. The word *outlaw* (*utlaghe*) *utlagatus*, is not from the Latin *lex*, but from the Saxon *laga*, which signifies *law*. And a person outlawed, signifies one that is out of the protection of the king, and out of the aid of the law. *Meaning of the word outlaw.*

21. And a man which is outlawed is called outlawed, but a woman which is outlawed is called waived, and not *utlagata*; for that women are not sworn in leets or tornes, as men which are of the age of 12 or more are; and therefore men may be called *utlagati*, that is, *extra legem positi*, but women are *waviatæ*, that is, *derelictæ*, left out or not regarded, because they were not sworn to the law: wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworn to the law, which is intended of the oath of allegiance in the leet. 1 Inst. 122. *A woman outlawed.*

And hence it is, that a man under the age of 12 years, cannot be outlawed. 1 Inst. 122.

22. Process of outlawry lies in all indictments of treason or felony, and on all returns of a rescous; and also on all indictments of trespass with force and arms; and it seems probable, that it lies on an indictment of conspiracy, or deceit, or any other crime of a higher nature than a trespass with force and arms; but not on any indictment for a crime of an inferior nature. And it seems agreed, that it lies not on any action on a statute, unless it be given by such statute, either expressly, as in the case of a *præmunire*, or impliedly, as where a recovery is given by an action wherein such process lay before, as on a writ of trespass for a forcible entry, on the 8 H. 6. c. 9. because the statute expressly gives a recovery by such writ, and such process lies in it by the common law. 2 Haw. 302, 303. *For what outlawry may be.*

23. In

Outlawry proclaimed at the sessions.

23. In every *action personal* wherein any exigent shall be awarded out of any court, one writ of proclamation shall be awarded out of the same court, having day of teste and return as the writ of exigent shall have, directed and delivered of record to the sheriff where the defendant dwells; which writ of proclamation shall contain the effect of the action: And the sheriff shall make one proclamation in the open court, and another at the general quarter sessions where the defendant dwells, and another a month at least before the *quinto exactus*, by virtue of the said writ of exigent, at or near the most usual door of the church or chapel where the defendant shall be dwelling at the time of the exigent awarded, upon a *sunday* immediately after divine service. 11 *J. 1. c. 8.*

Return of the outlawry.

24. If there are two coroners in a county, or more, one may execute the writ, as in case of an exigent, but the return must be in the name of the coroners. 2 *H. H. 56.*

And the return of the outlawry must be certain: It must shew where the county court was held, and in what county; and must return the day, and year of the king to every *exactus*. 2 *H. H. 203.*

And also the sheriff's name and office must be subscribed to the return of the exigent. 2 *H. H. 204.*

Capias utlagatum.

25. It is said, that the justices in sessions cannot issue a *capias utlagatum*, but must return the record of the outlawry into the king's bench, and there process of *capias utlagatum* shall issue. 2 *H. H. 52.*

But in *T. 10 J.* The opinion of all the court of common pleas was, that if one be outlawed before the justices of the peace on an indictment of felony, they may award a *capias utlagatum*; and so was the opinion of *Periam* chief baron, and all the court of the exchequer: for they that have power to award process of outlawry, have also power to award a *capias utlagatum*, as incident to their authority and jurisdiction. 12 *Co. 103.*

Consequences of outlawry:

26. If a person be outlawed at the suit of one man, all men shall take advantage of this personal disability. 1 *Inst. 128.*

But such disability abateth not the writ, but only disableth the plaintiff, until he obtain a charter of pardon. 1 *Inst. 128.*

For treason or felony.

27. Upon outlawry in treason or felony, the offender shall lose and forfeit as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force. 2 *Haw. 446.*

For an inferior offence.

28. But the outlawry for a misdemeanor, doth not inure as a conviction for the offence, as it doth in cases of treason and felony; but as a conviction of the contempt for not answering, which contempt is therefore punished, not by fine as a conviction for the offence, but by forfeiture of goods and chattels for the contempt. *K. and Tiffin, 1 W. 2 Salk. 494.*

Goods forfeited from the time of issuing the exigent.

29. The very issuing of the exigent, in case of treason or felony, gives to the king the forfeiture of the goods of the party, from the time of the teste of the writ of exigent: and the forfeiture by the exigent awarded stands, altho' the indictment be quashed, until there be a judgment of reversal on a writ of error; because the king's title being of record, must be avoided by a record. 2 *H. H. 204, 205.*

Lands forfeited from the time of the outlawry.

30. And as the award of the exigent gives the forfeiture of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawed, to wit, in case of outlawry of treason his lands are forfeited to the king, of whom-

whomsoever they are held; and in case of outlawry of felony, to the lord by escheat, of whom they are immediately holden. 2 H. H. 206.

31. But it must be remembered, that the bare judgment of outlawry by the coroner, without the return thereof of record, is no attainder, nor gives any escheat; but it must be returned by the sheriff, with the writ of *exigi facias*, and the return indorsed. 2 H. H. 206. Or else it must be removed by certiorari: for the judgment given by the coroner in the county court is not matter of record, that court not being a court of record. 1 Inst. 288.

But the outlawry must be first returned.

32. And by the outlawry all *personal* chattels are vested in the king by forfeiture; but *real* chattels, or freehold estates are not vested in the king, till after inquisition found. 3 Salk. 262.

And after inquisition found.

33. In ancient times no man could have been outlawed but for felony, the punishment whereof was death; and upon this account, an outlawed man was called *woolfeshead*, because he might be put to death by any man, as a wolf that hateful beast might. But in the beginning of the reign of K. Ed. 3. it was resolved by the judges, for avoiding of inhumanity, and of effusion of christian blood, that it should not be lawful for any man but the sheriff, having lawful warrant, to put to death any man outlawed, tho' it were for felony; and if he did, he should undergo such pain of death, as if he had killed any other man: And so the law continueth to this day. 1 Inst. 28.

Whether it is lawful to kill an outlaw.

34. If a man be indicted before justices of the peace, and thereupon outlawed, and is taken and committed to prison, the justices of gaol delivery may award execution of this prisoner; for they are constituted to deliver the gaol. 4 Inst. 166. Hale's Pl. 158, 2 H. H. 35:

Judges of assize may award execution of persons outlawed before justices of the peace.

35. Where clergy is allowable, it shall be as much allowed to one who is outlawed, as to one who is convicted by verdict or confession. 2 Haw. 343.

Clergy in cases of outlawry.

But a statute taking the benefit of clergy from those who shall be found guilty, doth not thereby take it from those who are outlawed. 2 Haw. 343.

But by the 3. & 4 W. c. 9. s. 2. If any person be indicted of any offence, for which, by any former statute, he is excluded from clergy, upon conviction; if he shall be outlawed thereupon, he shall not have his clergy.

By any former statute] Hereby it appears, that this extends not to offences made felonies by statutes subsequent to this statute. 2 Haw. 348.

36. Where a person is outlawed, the defendant may shew all the matter and outlawry returned of record; and demand judgment if he shall be answered, because he is out of the law, to sue an action during the time that he is outlawed. 1 Inst. 128.

Person outlawed cannot be plaintiff.

37. It seems to be a good challenge of a juror, that he is outlawed, either for a criminal matter, or as some say, in a personal action; but not a principal challenge, but only to the favour, unless the record of the outlawry be produced. 2 Haw. 215, 417.

Cannot be a juror.

38. But it seems clear, that outlawry in a *personal* action is not a good exception against a witness, as it is against a juror. 2 Haw. 443.

May be a witness.

39. An outlawed person may make a will, and have executors or administrators. Cro. El. 575.

May make a will.

And

And an executor may reverse the outlawry of the testator, where he was not lawfully outlawed. 1 *Leon.* 325.

Reversing outlawry.

40. Outlawry may be reversed several ways; as by procuring a *superse-deas* and delivering it to the sheriff before the *quinto exactus*, or by shewing any matter apparent on record which makes the outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, or a return by a person appearing not to be sheriff, or a variance between the original and exigent or other process, or by a misnomer, or want of addition. 2 *Haw. c.* 50.

In what case the party must appear personally to reverse it.

41. And upon a writ of error upon an outlawry in felony, the party outlawed must render himself in custody, and pray the allowance of the writ of error in person: and if the outlawry be reversed, he shall be put to answer the indictment. 2 *H. H.* 209.

But by the 4 & 5 *W. c.* 18. one outlawed, except for treason or felony, need not appear in person to reverse an outlawry, but by an attorney. 2 *Salk.* 496.

Other kinds of process.

42. There is another kind of process out of a court of record, against offenders, called *attachment*, which is generally for contempt; which belongs to title **Attachment**.

The process against *jurors*, may be seen in the title **Jury**.
And the process against *witnesses*, in title **Evidence**.

Forms of process; and first of a *Venire*.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, To the sheriff of the county of——, greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you cause A. O. of——in your said county, yeoman, to come before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at——in your said county, on the——day of——next ensuing, to answer unto us upon certain articles presented against him the said A. O. And have you there then this precept. Witness J. P. and K. P. at——the——day of——in the——year of our reign.

And upon this *venire*, if the defendant be returned sufficient, and maketh default, then a *distringas* shall be awarded, and so the same process infinite, until he come in: But if a *nihil habet* be returned at the first, then after the *venire*, there shall go out a *capias*, *alias*, *pluries*, and *exigent*. Dalt. Sher. 160.

Form of a *distringas*.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To the sheriff of the county of——greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and distrain A. O.

A. O. of——in your county, yeoman, by all his lands and tenements, &c. and that you answer for the issues thereof, &c. and that you have his body before our justices assigned [and so on, as before in the venire.]

But if a *nihil* (as hath been said) be returned at first upon the *venire facias*; then a *capias* shall issue, thus:

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth: To the sheriff of the county of——greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take A. O. of——in your county, yeoman, if he shall be found in your bailiwick, and him cause to be safely kept; so that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at——in your county, on the——day of——next ensuing, to answer unto us concerning divers trespasses, contempts, and offences, of which he is indicted. And have you there then this writ. Witness J. P. and K. P. at——the——day of——in the——year of our reign.

At which day A. S. knight, sheriff of the county aforesaid, returned that he is not found in his bailiwick, and he did not come. Therefore it is commanded as before.

Note; The cause why the entry is made, and he did not come, is, because the party may appear voluntarily, and so avoid the attachment or arresting of his body.

The Alias Capias.

GEORGE——To the sheriff——We command you, as we before commanded, that you omit not——(as before.)

At which day——(as before); and he did not come. Therefore it is commanded to the sheriff as it hath been often commanded, &c.

The Pluries Capias.

GEORGE, &c. To the sheriff, &c. We command you, as we have often commanded you, that you omit not (as before.)

At which day A. S. knight, the sheriff aforesaid, returned, that the aforesaid A. O. is not found in his bailiwick, and he did not come. Therefore it is commanded, that you cause to be demanded, &c.

The Exigent.

GEORGE, &c. To the sheriff, &c. greeting. We command you, that you cause A. O. of——in your county, yeoman, to be demanded, until, by the law and custom of our kingdom of Ireland, he be outlawed, if
4 H he

Process.

he shall not appear; and if he shall appear, that then you take him, and cause him to be safely kept, so that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in your said county committed, at the general quarter sessions of the peace of your county next after the feast of———next ensuing to be held, wheresoever in the same county it shall happen to be holden, to answer unto us of divers trespasses, contempts, and offences, of which he is indicted. And have you there then this writ. *Witness Sir J. P. baronet, at———in the said county, the———day of———in the———year of our reign.*

At which day A. S. knight, sheriff of the county aforesaid returned, that at the county holden at———the———day of———in the———year of the reign of our lord the king that now is, and so at four other counties then next following, there holden, the aforesaid A. O. was demanded, and did not appear. Therefore by the judgment of the coroner of our said lord the king, in the county aforesaid, he was outlawed.

The Capias Utlagatum.

GEORGE, &c. To the sheriff, &c. greeting. We command you, that you omit not, by reason of any liberty in your county, but that you take A. O. late of———in your county, labourer, if he shall be found within your county, and him cause safely to be kept, so that you have his body before the keepers of our peace and our justices assigned to hear and determine divers felonies, trespasses, and other misdemeanors in your county committed, at———the———day of———to stand right in our court before our justices aforesaid, upon a certain outlawry against him the said A. O. promulged, at our suit, for certain felonies (or trespasses) whereof he was convicted the———day of———. And have you then there this writ. *Witness, &c.*

Publick Worship.

Impugners of the rites of the church.

1. **I**mpugners of the book of common prayer, of the 39 articles, of the rites and ceremonies of the church of———of the episcopal government of the church, or of the form of ordering and consecrating archbishops and bishops, shall be *ipso facto* excommunicated, and not restored but upon repentance, and publick recantation. *Can. 3, 4, 5.*

Speaking irreverently of the sacrament.

2. If any person shall speak unreverently of the sacrament of the lord's supper, he shall suffer imprisonment, and make fine and ransom at the king's will. And three justices (1 Q.) may take information by the oaths of two witnesses; and afterwards, at the sessions, may inquire thereof by the oaths of 12 men upon indictment. And they shall, at the sessions where the offender shall be indicted, direct a writ to the bishop to appear by himself or deputy at the trial. But no person shall be molested, but within three months after the offence committed. *En. st. 1. Ed. 6. c. 1.*

Penalty of 12d. a Sunday for not resorting to church.

3. All persons, having no lawful or reasonable excuse to be absent, shall resort to their parish church or chappel, or upon reasonable let thereof, to some usual place where divine service shall be performed, according to

to the liturgy and practice of the church of *Ireland*, upon every *sunday* and holiday; on pain of punishment by the censures of the church, or of forfeiting 12*d.* for every offence to the poor, to be levied by the churchwardens by distress. 2 *El. c. 2. f. 14. 24.* Except dissenters qualified by the act of toleration. 6 *G. 1. c. 5.*

And he who is absent from his own parish church shall be put to prove where he went to church. 1 *Haw. 13.*

And any justice of the peace, on proof unto him made (in one month after default in coming to church on *sundays*) by confession, or oath of witness, may call the party before him; and if he shall not make a sufficient excuse, and due proof thereof, to the justice's satisfaction, such justice may give warrant to the churchwarden to levy 12*d.* to the use of the poor, by distress. For want of distress, commitment till paid. *En. st. 3 f. c. 4. f. 27, 28.*

4. Every person above the age of 16 years, who shall not repair to some church, chapel, or usual place of common prayer, being convicted thereof before the judges of assize, or justices in sessions, shall forfeit 20*l.* a month, one third to the king, one third to the maintenance of the poor of the parish, and of the houses of correction, and of impotent and maimed soldiers, as the lord treasurer, chancellor, and chief baron of the exchequer shall order, and one third to him who shall sue in any court of record. If not paid in three months after judgment, he shall be imprisoned till he pay or conform himself to go to church. *En. st. 23 El. c. 1. f. 5, 8, 11. & 29 El. c. 6. f. 7.*

Penalty of 20*l.* a month, for not resorting to church.

And this penalty of 20*l.* a month dispenseth not with the forfeiture of 12*d.* a *Sunday*; for both may well stand together; and the 12*d.* is immediately forfeited upon the absence of each particular day. 1 *Haw. 13.*

And every offender in not repairing to divine service, having been once convicted (and not conforming) shall pay 20*l.* a month into the exchequer, in the term of *Easter* or *Michaelmas* which shall be next after such conviction; and also shall, without any other indictment or conviction, for every month after such conviction, so long as he shall not conform, pay into the exchequer in every *Easter* and *Michaelmas* term, as much as shall then remain unpaid, after such rate of 20*l.* a month: and if default shall be made in any part of such payment, the king may by process out of the exchequer, seize all the goods, and two parts of the land, of such offender. *En. st. 29 El. c. 6. f. 3, 4, 5, 6. & 3 f. c. 4. f. 8, 9.*

Or the king may refuse the 20*l.* a month, tho' it be duly tendered, and seize two parts of the lands at his option. *En. st. 3 f. c. 4. f. 11.*

But copyhold lands are not within these statutes, in respect of the prejudice which would accrue to the lord, by the loss of his services. 1 *Haw. 14.*

And every person who shall usually on *Sundays* have in his house divine service as established by law, and be thereat himself usually present, and shall four times a year go to the parish church or other common church or chapel, shall not incur any penalty for not repairing to church. *En. st. 23 El. c. 1. f. 12.*

And this also shall not extend to qualified protestant dissenters. 6 *G. 1. c. 5.*

Penalty for
harbouring a
recusant.

5. Every person who shall retain in his service, or shall relieve, keep, or harbour in his house any servant, sojourner, or stranger, who shall not repair to church, but shall forbear for a month together, not having reasonable excuse, shall forfeit 10 *l.* for every month he shall continue in his house such person so forbearing. And the justices in sessions may determine the same. *En. st. 3. f. c. 4. f. 32, 33, 36.*

Recusant disabled as to offices.

6. No recusant convict shall practise law or physick, nor shall be judge or minister of any court, or bear any military office by land or sea; and shall forfeit for every offence 100 *l.* And shall also be disabled to be executor, administrator, or guardian. *En. st. 3. f. c. 5. f. 8, 22.*

Recusant conforming.

7. A recusant conforming himself shall be discharged of all penalties, which he might otherwise sustain by reason of his recusancy. 1 *f. c. 4. f. 2.*

Publick worship in the navy.

8 All commanders, captains, and officers at sea, shall cause the publick worship of almighty God, according to the liturgy of the church of *England*, to be performed in their respective ships: And prayers and preachings by the chaplains shall be performed diligently. *Br. st. 22 G. 2. c. 33. art. 1.*

Qualification of lecturers.

9. No person shall be received as a lecturer, or allowed to preach or read any lecture or sermon, without licence from the bishop, and assenting to the 39 articles, and reading the common prayer before his first sermon, and on the first lecture day of every month: on pain of three months imprisonment, for every offence, by two justices of the peace on certificate from the bishop of the offence committed. 17 & 18 C. 2. 6. f. 17, 18, 19.

Disturbers of publick worship.

10. By the *En. st. 1 Mar. sess. 2. c. 3.* If any person shall disturb a preacher in his sermon by word or deed, he shall be apprehended and carried before a justice of the peace, who shall commit him to safe custody, and within six days, he and another justice shall examine the fact, and if they find him guilty by two witnesses, or confession, they shall commit him to gaol for three months, and further to the next sessions; and if at the sessions he repents, and is reconciled, he shall be discharged on finding sureties for his good behaviour for a year; if not, he shall be continued in gaol till he does; saving the ecclesiastical jurisdiction; and he shall not be punished both ways.

And this statute, tho' made in queen *Mary's* reign, extendeth to the divine service now established. *Gibf. 372.*

And by the 6 G. 1. c. 5. f. 12. If any person shall willingly and of purpose, come into any church, chapel, or other congregation permitted by the act of toleration, and disquiet or disturb the same, or misuse any preacher or teacher; he shall on proof thereof before one justice, by two witnesses, find two sureties to be bound by recognizance in 50 *l.* and in default thereof shall be committed till the next sessions, and on conviction thereof of the said offence, he shall forfeit to the king 20 *l.*

But it shall be lawful for all men, as well in churches, chapels, oratories, or other places, to use openly any psalms or prayer taken out of the bible, at any due time, not letting or omitting thereby the service. *En. st. 2 & 3 Ed. 6. c. 1. f. 7.*

And the court of king's bench refused to grant a certiorari, to remove an indictment at the sessions, for a person not behaving himself modestly and reverently at the church, during divine service; which altho' punishable by ecclesiastical censures, yet the court conceived it a proper cause within cognizance of the justices of the peace. 1 *Keb.* 491. And this was before the abovementioned statute of the 6 *G.* 1. c. 5.

11. No clergyman shall be arrested in any church or churchyard, whilst he attends to divine service; on pain of the imprisonment of the offender, and ransom at the king's will, and gree to the party arrested. 50 *Ed.* 3. c. 5. *1 R.* 2. c. 15. Arresting a clergyman attending divine service.

But the arrest notwithstanding, if not on a *Sunday*, is good in law. *Watson*, c. 34.

Purveyors.

1. **A**ntiently the king's court was supplied with necessaries from the antient demesnes of the crown; and in respect thereof, the tenants of those lands had many privileges, which they still enjoy: but this method being found to be troublesome and inconvenient, was by degrees disused; and afterwards the king was wont to appoint certain officers to buy-in provisions for his household, who were called purveyors, and claimed many privileges by the prerogative of the crown. 2 *Inst.* 542. 1 *Haw.* 114. Abuses of purveyors.

2. The several laws which restrained the exorbitancies of these purveyors, make up a pretty large title in the old books; but these laws proving ineffectual to remedy the evil complained of, at length by the statute of the 12 *C.* 2. c. 24. purveyance was entirely taken away: by which it is enacted, that no sum of money, or other thing, shall be taken for any provision, carriages, or purveyance for the king. Purveyance taken away.

And that no person, under colour of purveyance, shall take any timber, fuel, cattle, corn, grain, malt, hay, straw, victual, cart, carriage, or other thing, without consent of the owner; nor shall require any to furnish any horses, oxen, or other cattle, carts, ploughs, wains, or other carriages, for the use of the king, or his household, without the owner's consent:

On pain of being committed to gaol, by a justice of the peace and the constable, until the next sessions, to be there indicted; and also of paying to the party treble damages, and treble costs, on an action at law.

Quakers.

SO far as quakers are concerned in the act of toleration, amongst other protestant dissenters, see title **Dissenters**.

For quakers oaths, see title **Oaths**.

1. *What*

I. *What it is.*II. *Evidence on an indictment of rape.*III. *Punishment of rape.*IV. *Principal and accessory.*I. *what it is.*

Rape, what.

Child under ten.

Consenting at last.

Ravishing a common strumpet.

Consenting after the fact.

Woman ravished conceiving.

The woman's oath.

1. **R**APE is when a man hath carnal knowledge of a woman, by force, and against her will. 2 *Inst.* 180. 1 *Haw.* 108.

2 Also, if any person shall unlawfully and carnally know, and abuse any woman child, under the age of ten years, whether with her consent or against it, he shall be guilty of felony without benefit of clergy. 18 *El.*

c. 7.

3. The offence of rape is no way mitigated, by shewing that the woman at last yielded to the violence, if such her consent was forced by fear of death, or of dures. 1 *Haw.* 108.

4. Also, it is not a sufficient excuse in the ravisher, to prove that the woman is a common strumpet; for she is still under the protection of the law, and may not be forced. 1 *Haw.* 108.

5. Nor is it any excuse, that she consented after the fact. 1 *Haw.* 108.

And by the 6 *R.* 2. c. 6. When any woman is ravished, and afterwards doth consent to the ravisher; they shall both of them be disabled to have any inheritance, dower, or joint feoffment, but the next of blood shall enter. And the next of kin to the woman ravished may have an appeal against the ravisher, notwithstanding such consent; and the defendant shall not be received to wage battle.

6. It is said by Mr. *Dalton*, that if a woman at the time of the supposed rape do conceive with child by the ravisher, this is no rape; (for he says) a woman cannot conceive except she doth consent. And this he hath from *Stamford* and *Britton*, and *Finch*. *Dalt.* c. 160.

But Mr. *Hawkin's* observes, that this opinion seems very questionable not only because the previous violence is no way extenuated by such a subsequent consent; but also, because if it were necessary to shew, that the woman did not conceive, the offender could not be tried till such time as it might appear whether she did or not; and likewise because the philosophy of this notion may be very well doubted of. 1 *Haw.* 108.

And L. *Hale* says, this opinion in *Dalton* seems to be no law. 1 *H. H.* 731.

II. *Evidence on an indictment of rape.*

1. The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. 1 *H. H.*

2 For

2. For instance, if the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; shewed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors; if the place, where in the fact was done, was remote from people, inhabitants, or passengers; if the offender fled for it: these, and the like, are concurring evidences to give greater probability to her testimony, when proved by others as well as her self. 1 H. H. 633. Circumstances in favour of it.

3. But on the other side, if she concealed the injury for any considerable time, after she had opportunity to complain; if the place, where the fact was supposed to be committed, were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; or if a man prove himself to be in another place, or in other company, at the time she charges him with the fact; or if she is wrong in the description of the place, or swears the fact to be done in a place where it was impossible the man could have access to her at that time, as if the room was locked up, and the key in the custody of another person: these and the like circumstances carry a strong presumption, that her testimony is false or feigned. 1 H. H. 633. Circumstances in dis-favour of it. *Read. Rape.*

4. Upon the whole; rape, it is true, is a most detestable crime, and therefore ought severely and impartially to be punished with death: but it must be remembred, that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, tho' never so innocent: therefore a wise jury will be cautious upon trials of offences of this nature, that they be not so much transported with indignation at the heinousness of the offence, as to be over hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of malicious and false witnesses. 1 H. H. 635, 636. Caution.

III. Punishment of rape.

1. Of old time rape was felony, for which the offender was to suffer death: afterwards the offence was made lesser, and the punishment changed from death to the loss of those members whereby he offended; that is to say, it was changed to castration and loss of his eyes, unless she that was ravished, before judgment, demanded him for her husband. Felony without benefit of clergy.

2 *Inst.* 180.

Then by the statute of the 3 *Ed.* 1. c. 13. It was made a trespass, subjecting the offender to two years imprisonment, and a fine, at the king's will; and it was again made felony by the 13 *Ed.* 1. c. 34. and at last by the 9 *Ann.* c. 6. was excluded from the benefit of clergy.

2. And no charter of pardon shall be allowed for rape, unless the rape be specified therein. 13 *R.* 2. *st.* 2. c. 1. Pardon.

And all rapes are excepted out of the general pardon, of the 20 *G.* 2. c. 52.

IV. Prin-

IV. Principal and accessory.

Persons present and aiding, are principals.

Not present, accessories.

1. Mr. *Hawkins* says, all who are present, and actually assist a man to commit a rape, may be indicted as principal offenders, whether they be men or women. 1 *Haw.* 108.

And, so one woman may be a principal to the ravishment of another.

2. And L. *Hale* says, that the principals in rape are ousted of clergy, whether they be principals in the first degree, to wit, he that committed the fact; or principals in the second degree, to wit, present, aiding, and abetting: but accessories, before and after, have their clergy. 1. *H. H.* 633.

Indictment for a rape.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of _____ in the county of _____ yeoman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the _____ day of _____ in the _____ year of the reign of _____ with force and arms, at _____ in the county aforesaid, in and upon one A. I. spinster, in the peace of God and of our said lord the king then and there being, violently and feloniously did make an assault, and her the said A. I. against the will of her the said A. I. then and there feloniously did ravish and carnally know; against the peace of our said lord the king, and against the form of the statute in such case made and provided.

Recognizance.

What it is.

1. **A** Recognizance is a bond of record, testifying the recognizor to owe a certain sum of money to some other; and the acknowledging of the same is to remain of record; and none can take it but only a judge or officer of record. *Dalt. c.* 168.

In what cases it may be taken.

2. And these recognizances, in some cases the justices of the peace are enabled to take by the express words of certain statutes: but in other cases (as for the peace, and good behaviour, and the like) it is rather in congruity, and by reasonable intendment of law, than by any express authority given them, either by their commission, or by the statute law. *Crom.* 125. *Dalt. c.* 168.

But wheresoever any statute giveth them power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause, they may take a recognizance. Yea, wheresoever they have authority given them to cause a man to do a thing, there it seemeth they have in congruity power given them to bind the party by recognizance to do it: and if the party shall refuse to be bound, the justice may send him to gaol. *Dalt. c.* 168.

But

Recognizance.

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But he can take no recognizance but only of such matters as concern his office: and if he doth, it seemeth to be void. *Dalt. c. 168.*

3. Every obligation and recognizance, taken, by justices of the peace, must be made to *our lord the king*; on pain of imprisonment of any person that shall take it otherwise. *Dalt. c. 168.* The form of it.

It must also contain the name, place of abode, and trade or calling, both of principal and sureties, and the sums in which they are bound. *Barl. Recog.*

And it is most commonly subject to a *condition*, which is either indorsed, or under written, or contained within the body of it; upon the performance of which the recognizance shall be void. *id.*

4. When the parties are to enter into recognizance, call them by their names thus: "You *A. B.* acknowledge to owe to our sovereign lord the king, the sum of ——— And you *C. D.* acknowledge to owe to our sovereign lord the king, the sum of ——— to be levied of your respective goods and chattels, lands and tenements, for the use of our said lord the king, his heirs and successors, if default shall be made in the condition following; that is to say, if you the said *A. B.* shall make default in appearing, &c." But the parties need not to sign it. *id.* Manner of taking it.

And it is usual for the justices to mark at the foot of the examination, *A. B.* in 40*l.* to appear, &c. And from such short note to make out a record afterwards. *id.*

Yet the recognizance is a matter of record presently, so soon as it is taken and acknowledged, altho' it be not made up. *Dalt. c. 168.*

Lord Coke (1 *Inst.* 260.) says, that a record is a memorial or remembrance in rolls of *parchment*, &c. From whence it seemeth that a recognizance ought to be ingrossed on parchment, perhaps for this reason, because parchment is more durable than paper; but since there is no law which prohibits it to be ingrossed on paper, it seemeth that if it shall be on paper only, and not on parchment, it is good in law.

And when it is made up, if the justice shall only subscribe his name, without his seal to it, this is well enough; and that may be in either of these sorts, *acknowledged before me J. P.* or only to subscribe his name thus, *J. P.* *Dalt. c. 176.*

5. The justices shall certify their recognizances for keeping the peace, to the next sessions, that the party may be called; and if he make default, the default shall be recorded, and the recognizance, with the record of the default, shall be sent and certified into the chancery, king's bench, or exchequer. 3 *H. 7. c. 1.* How to be certified.

But in cases of felony, the recognizances are to be certified to the general gaol delivery.

6. *H. 7. Ann. Q.* and *Lord Drummond*. Lord Drummond stood bound by recognizance to appear in the court of king's bench the first day of the term; and Sir *Simon Harcourt* excusing his non-appearance by reason of sickness, moved that his recognizance might be discharged, the attorney general having orders, and being in court consenting thereto. But *Holt* chief justice said, notwithstanding such consent, my lord Drummond not appearing in person, the court could not discharge the recognizance, but *id.* How discharged.

Recognizance.

said, they could respite it till the next term; which was done accordingly.
11 Mod. 200.

E. 12 Ann. Q. and Ridpath. Ridpath entered into a recognizance with sureties to appear the first day of the term to answer (generally), and in the mean time to be of the good behaviour, and not to depart without leave of the court. An information was preferred against him by the attorney general; who, for some defect in the pleading, entered a *nolle prosequi*, and then exhibited a new information. The court was of opinion, that the recognizance extended to all crimes whatsoever that he should be charged with; and that if it should have relation to any particular crime only, it must be mentioned in the recognizance, which in this case is only *to answer generally*; that the inconvenience is not so great as is pretended, the bail in this case, being bound in a sum certain, and not to stand in the place of the principal, as in civil cases; and that the *nolle prosequi* is neither a bar nor discharge.
10 Mod. 152.

H. 1 G. K. and Tomb. If a recognizance is estreated in the exchequer, because not punctually complied with, yet if the party appears and takes his trial next session, he may compound for a very small matter in the court of exchequer; because the effect, though not the exact form of the recognizance, is complied with. The judges of oyer and terminer are the proper judges, whether recognizances ought to be estreated or spared; and it is for the advantage of publick justice, that they should have such power, if upon the circumstances of the case they see fit. 10 Mod. 278.

And by parity of reason it should seem, that the justices of the peace in the quarter-sessions should have the like power in respect of offences cognizable there.

The conditions of recognizances, in all the variety of cases, are interspersed under their proper titles.

Recognizance with sureties

Dublin. **B**E it remembred, that on the ——— day of ——— in the ——— year of the reign of our lord George the third of Great Britain, France, and Ireland, king, defender of the faith, and so forth, A. O. of ——— in the county aforesaid, yeoman, and A. S. of ——— in the county aforesaid, taylor, and B. S. of ——— in the county aforesaid, labourer, personally came before me J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, and acknowledged themselves to owe to our said lord the king; that is to say, the said A. O. the sum of 20l. and the said A. S. and B. S. each the sum of 10l. separately, of good and lawful money of Great Britain, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said lord the king, his heirs and successors, if the said A. O. shall make default in the condition hereon indorsed [or, here-under written.]

Acknowledged before me

J. P.

Re-

Recognizance.

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Recognizance without sureties.

Dublin. **B**E it remembred, that on the ——— day of ——— in the ——— year of the reign of our lord George the third of Great Britain, France, and Ireland, king, defender of the faith, and so forth, A. O. of ——— in the said county, yeoman, personally came before me J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, and acknowledged himself to owe to our said lord the king, 10l. of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he the said A. O. shall fail in the condition under written [or, indorsed].

J. P.

The condition of the abovewritten [or, within written] recognizance is such, that if the abovebound A. O. shall ——— Then the said recognizance to be void, or else remain in its force.

Rescue.

1. **R**ESCOUS is an antient French word, coming from *rescourrer*, ^{What is a} that is *recuperare*, to recover; and signifies a forcible setting at li- ^{rescous.} berty against law, a person arrested by the process or course of law. 1 *Inst.* 160.

It seems that it is necessary, that the rescuer should have knowledge that the person is under arrest for a criminal offence, if he be in the custody of a private person; but if he be in the custody of an officer, there at his peril he is to take notice of it. 2 *H. H.* 606.

But it is said, that to rescue a felon taken on a general warrant, to answer what shall be objected against him, no cause being expressed in the warrant, is not felony. 1 *H. H.* 578.

Nor unless a felony hath been really done. *Hale's Pl.* 116.

2. Altho' a *prison breaker* may be arraigned for that offence, before he ^{When it shall} be arraigned of the crime for which he was imprisoned; yet he, who *rescues* ^{be tried.} one imprisoned for felony, cannot, according to the better opinion, be arraigned for such offence as for a felony, till the principal offender be attainted; but he may be immediately proceeded against for a misprison, if the king pleases. 2 *Haw.* 140.

And therefore if the principal die before the attainder, he shall be fined and imprisoned. *Hale's Pl.* 116.

Also, if the principal be found not guilty, or guilty of a crime not capital, the rescuer ought to be discharged of felony, but he may be fined for the misdemeanor. 1 *H. H.* 598, 599.

3. An indictment of *rescous*, must set forth the nature and cause of the ^{Indictment.} imprisonment, and the special circumstances of the fact in question. 2 *Haw.* 140.

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Restitution of stolen goods.

THERE are three means of restitution of goods, for whom they were stolen; 1. By appeal of robbery or the statute of the 28 H. 8. c. 10. And, 3. By the course of law. 1 H. H. 538.

1. *Upon an appeal of robbery or larceny.* If the party were upon, restitution of the goods contained in the appeal, was the appellant; for it is one of the ends of that suit. 1 H.

And hence it is, that if an appeal of felony or robbery omit any of the goods stolen from him, they are forfeit to the king. 1 H. H. 538.

And this appeal must be upon fresh suit; and though it was strict herein, as to the time and manner of the pursuing of the felon, yet the law is now more liberal. 1 H. H.

For if the felon be taken by any others, as by the sheriff, robbed come within a year after, and give notice of the felon appeal, this is a fresh suit, if he used his diligence shortly to have taken him. 1 H. H. 540.

If a felon waive the goods stolen, without any pursuit goods are not in law waived, nor forfeit to the king or lord; but if he waive them upon a pursuit of him, then they are forfeit to the king or lord of the liberty. 1 H. H. 541.

And this forfeiture is not like a stray, where though the party who is the owner may retake them within the year and day, but here the true owner cannot seize his own goods, though within the year and day. 1 H. H. 541.

But yet this is not an absolute loss of the owner's goods; it is expedient, settled by law, to drive the owner to convict the felon by prosecuting his appeal; and therefore if he make fresh suit, a new appeal; and the felon be thereupon convicted or attainted, and inquired and found, by verdict or inquest of office, he shall have back on of the goods so waived. 1 H. H. 541.

2. *By the statute of the 28 H. 8. c. 10.* Which statute is now in law for restitution; for before this statute there was no restitution by indictment, but only upon an appeal: Which said statute enacts the following laws:

If any felon do rob or take away any man's money or goods, and be indicted, and arraigned, and found guilty, or otherwise attainted, and evidence given by the party robbed, or owner of the money or goods, any other by their procurement; then the party robbed, or owner shall be restored to such his money or goods: and as well the justice of the peace, as other justices before whom the felon shall be found guilty, or otherwise attainted, may award a writ of restitution, in like manner as was used where they were attainted on appeal.

Found guilty or otherwise attainted] By this it seems questionable whether the party be intitled to restitution, upon the defendant's being found guilty, in which case he is neither found guilty, nor otherwise attainted.

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Restitution by
the statute of
21 H. 8.

money or goods, and thereof be
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robbed, or owner of the goods,
as well the justices of gaol de-
shall be found guilty, or other-
n, in like manner as if the felon

as it seems questionable, whe-
he defendant's standing mute;
herwise attainted. 2 H. H. 332.

Or

Or otherwise attainted] If the owner prefers a bill of indictment, which is found, and the felon flies, and is outlawed, the owner shall have restitution; for he gave evidence upon the indictment, which though it be not a conviction, is the ground of the outlawry, which is an attainder. 1 H. H. 545.

The party robbed, or owner] Therefore if the servant be robbed of the master's money, or his servant by his procurement, give evidence, and convict the felon, the master shall have a writ of restitution, if it appear upon the indictment and evidence, that it was the master's money; for the statute gives restitution to the party robbed, or owner. 1 H. H. 542.

Or owner] If the testator is robbed, and the thief is convicted upon the procurement of the executor; such executor shall have restitution; for this being a beneficial law, ought to be construed beneficially, so as to extend to executors and administrators. 3 Inst. 242.

Shall be restored] If goods be stolen, and not waived in flight, nor seized by the king's officers, or lord of the manor, nor sold in open market, the owner may take them again, without any writ of restitution, or may bring his action for them; and this, although he doth not prosecute the offender. 2 Haw. 168. Kewli. 48.

But otherwise, if the goods be waived by the felon in his flight, or in case they be not waived, yet if they be seized by the king's officers, or lord of the manor, as suspecting them to be stolen; there the party shall not have restitution, unless the felon be convicted at his prosecution. 2 Haw. 168. Kewli. 48.

And in such case, he shall have no more than what is mentioned in the indictment, though other goods were stolen at the same time; and the reason is, because by such omission, the offender might have escaped. Kely 49. 1 H. H. 545.

To such his money or goods] A man stole cattle, and sold them in open market; the sheriff seized the thief and the money, and he was convicted and hanged at the prosecution of the owner of the cattle, and he had restitution of the money; for though the statute gives power to the justices to award restitution of the *money or goods stolen*, and though the money in this case was not stolen, yet because it did arise by stealing, it shall be within the equity, though not in the very words of the statute. Noy 128.

But it hath been a great question, if goods be stolen, and by the thief sold in a market overt, whether the thief being convicted upon the evidence of the party robbed, he shall have restitution upon this statute of the thing sold or not, the buyer not being privy to the felony: But lord Hale argues strongly, that he shall have restitution, notwithstanding the sale in market overt of the goods stolen. 1. Because this act was made to encourage persons robbed, to pursue malefactors, and therefore they have an assurance of restitution; and it would be small encouragement if a thief by sale in a market overt, which is every day almost in every shop in London, should

should elude it. 2. Because the man that is robbed, is robbed against his will, and cannot help it; but the buyer of stolen goods may chuse whether he will buy, or if he buy, may yet refuse to buy, unless well secured of the property of the goods, or knowing the owner. 1 *H. H.* 542, 3, 4. 2 *Haw.* 170. *Keilw.* 48.

In like manner as if the felon were attainted on appeal] And yet, upon this statute, if the offender be convicted upon the evidence of the party robbed, or owner, he shall have restitution, though there were no fresh suit, or any inquiry by inquest touching the same; and this is the constant practice, though in case of an appeal it be otherwise. 1 *H. H.* 545.

Yet if it shall appear to the court, that the party hath been guilty of gross neglect in prosecuting; it seemeth that in such case he shall not be intitled to restitution. 2 *Haw.* 171.

3. *By the course of the common law.* If the owner takes his goods again of the offender, to the intent to favour him, or maintain him, this is unlawful, and punishable by fine and imprisonment; but if he take them again without any such intent, it is no offence. 1 *H. H.* 546. Restitution by the common law.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them; because he hath pursued the law upon him, and may have his writ of restitution, if he please. 1 *H. H.* 546.

Riot, rout, and unlawful assembly.

I. *What is a riot, rout, or unlawful assembly.*

II. *How the same may be restrained by a private person.*

III. *How by a constable, or other peace officer.*

IV. *How by one justice.*

V. *How by two justices.*

VI. *How by process out of chancery.*

I. *What is a riot, rout, or unlawful assembly.*

WHEN three persons or more shall assemble themselves together, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful; If they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an *unlawful assembly*.

If after their first meeting, they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not; this, according to the general opinion, is a *rout*.

And

And if they execute such a thing in deed, then it is a riot. (A) 1 Haw. 155. Dalt. c. 136.

Three persons or more] And therefore if the jury do acquit all but two, and find them guilty, the verdict is void, unless they be indicted together with other rioters unknown, because it finds them guilty of an offence, whereof it is impossible that they should be guilty; for there can be no riot, where there are not more persons than two. 2 Haw. 441.

And infants under the age of discretion are not persons within this description, punishable as rioters. 1 Haw. 159.

Note; In 1 Haw. 156, 157, 158, the words *more than three persons* are three times over inserted instead of *three persons or more*; which is only remarked as an instance, that in a variety of matter, it is impossible for the mind of man to be always equally attentive.

Assemble themselves together] It seems agreed, that if a number of persons being met together at a fair, or market, or church-istle, or on any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it: Yet it is said, that if persons innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 Haw. 156.

In the execution of some enterprize of a private nature] It seems agreed, that the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private quarrel only; as the inclosing of lands, in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interest or disputes of particular persons, and no way concerning the publick; for wherever the intention of such an assembly is to redress publick grievances, as to pull down all inclosures in general, or reform religion, and the like, it is high treason. 1 Haw. 157.

Against the peace, or to the terror of the people] It seems to be clearly agreed, that in every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done to the terror of the people: And from hence it clearly follows, that assemblies at wakes, or other festival times, or meetings for exercise of common sports or diversions, as bull baiting, wrestling, and such like, are not riotous. 1 Haw. 157.

And

And from the same ground also it seems to follow, that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprize, without being rioters; as if a man assemble a meet company, to carry away a piece of timber or other thing, whereto he pretends a right, that cannot be carried without a great number, if the number be not more than are needful for such purpose, although another man hath better right to the thing so carried away, and that this act be wrong and unlawful; yet it is of itself no riot, except there be withal threatening words used, or other disturbance of the peace. *Dalt. c. 137. 1 Haw. 157.*

Much more may any person, in a peaceable manner, assemble a meet company, to do any lawful thing, or to remove or cast down any common nuisance: Thus every private man, to whose house or land any nuisance shall be erected, made, or done, may in peaceable manner assemble a meet company, with necessary tools, and may remove, pull, or cast down such nuisance, and that, before any prejudice received thereby; and for that purpose, if need be, may also enter into the other man's ground. Thus a man erected a wear cross a common river, where people have a common passage with their boats, and divers did assemble, with spades, crows of iron, and other things necessary to remove the said wear, and make a trench in his land, that did erect the wear, to turn the water, so as they might the better take up the said wear, and they did remove the same nuisance; this was holden neither any forcible entry, nor yet any riot, *Dalt. c. 137.*

But in the cases aforesaid, if in removing any such nuisance, the persons so assembled shall use any threatening words (as to say, they will do it, though they die for it, or such like words) or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot; and therefore where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only, without disturbance of the peace, or threatening speeches. *Dalt. c. 137.*

Whether the act intended were of itself lawful or unlawful] It hath been generally holden, that it is no way material, whether the act intended to be done by such an assembly, be of itself lawful or unlawful; from whence it follows, that if three or more persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like in number in a violent and tumultuous manner join together in removing a nuisance, or other thing which may lawfully be done in a peaceful manner, they are as properly rioters, as if the act intended to be done by them were never so unlawful. *1 H. 158.*

II. How the same may be restrained by a private person.

By the common law, any private person may lawfully endeavour to suppress a riot, by staying those whom he shall see engaged therein, from executing their purpose, and also by stopping others whom he shall see coming to join them. 1 *Haw.* 159.

III. How by a constable or other peace officer.

By the common law, the sheriff, constable, and other peace officers, may and ought to do all that in them lies, towards the suppressing of a riot, and may command all other persons to assist therein. 1 *Haw.* 159.

IV. How by one justice.

By the 34 Ed. 3. c. 1. *The justices of the peace shall have power to restrain rioters, and to arrest and chastise them according to their offence; and cause them to be imprisoned and duly punished, according to the law and custom of the realm, and according to that which to them shall seem best to do, by their discretions and good advisement.*

And this statute hath been liberally construed for the advancement of justice; for it hath been resolved, that if a justice find persons riotously assembled, he alone, without staying for his companions, hath not only power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer good bail; but that he may also authorize others to arrest them, by a bare verbal command, without other warrant; and that by force thereof, the persons so commanded may pursue and arrest the offenders in his absence, as well as presence. Also it is said, that after a riot is over, any one justice may send his warrant, to arrest any person who was concerned in it, and also that he may send him to gaol, till he shall find sureties for his good behaviour. 1 *Haw.* 160.

But it seems to be agreed, that no one justice hath any power by force of this statute, either to record a riot upon his own view, or to take an inquisition thereof after it is over: also if one justice, proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing himself, because no single justice is by this statute made a judge of the said offence. But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of *Northampton*, 2 Ed. 3. c. 3. and any one justice acting *ex officio*, in pursuance of the statute, seize the armour, and imprison the offender, and make a record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity. And for the same reason, if a justice proceeding on the statute of the 15 R. 2. against forcible entries and detainers, shall upon his own view record a riot, which shall be committed in the making of any such forcible entry or detainer, a riot so recorded cannot be traversed. Also if

if a justice acting as a judge by any statute whatsoever empowering him so to do, make a record upon his view of a riot committed in his presence, such record shall not be traversed; for the law gives such uncontrollable credit to all matters of record, made by any judge of record as such, that it will never admit of an averment against the truth thereof. 1 Haw. 160.

V. How by two justices.

1. If any riot, assembly, or rout of people, against the law, be made; the justices, three, or two of them at the least, and the sheriff, or under sheriff, shall come with the power of the county, if need be. 13 H. 4. c. 7. s. 1.

And the king's liege people being sufficient to travel, shall be assistant to them, upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies; on pain of imprisonment, and to make fine and ransom to the king. 2 H. 5. c. 8. s. 2.

If any riot, assembly, or rout of people, against the law, be made] It is said, that the justices are not only empowered hereby to raise the power of the county to assist them, in suppressing a riot which shall happen within their own view, or hearing, but also that they may safely do it upon a credible information given them of a notorious riot happening at a distance, whether there were any such riot in truth or not; for it may be dangerous for them to stay till they can get certain information of the fact: But they seem to be punishable for alarming the county in this manner, without some such probable ground of their proceeding, as would induce a reasonable man to think it necessary and convenient. 1 Haw. 161.

Assembly] It seems clear from hence, that if the justices in going towards the place where they have heard that there is a riot, shall meet persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful manner, and also make a record thereof; for the statute extends to all other unlawful assemblies whatsoever as well as to riots, 1 Haw. 161.

The king's liege people] Except women, clergymen, persons decrepit, and infants under the age of fifteen. 1 Haw. 161.

To resist such riots] And also to arrest the rioters, and conduct them to prison. 1 Haw. 161.

2. And shall arrest them. 13 H. 4. c. 7. s. 1.

And if they shall escape, they may take them on a fresh pursuit; but they cannot at another time award any process against them on the record, but ought to send the record into the king's bench, that process may issue thereon from thence: Yet there seems to be no doubt, but that they may arrest them for their trespasss on the aforesaid statute of the 24 Ed. 3. in order to compel them to find sureties for their good behaviour. 1 Haw. 162.

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3. *And the same justices and sheriff, or under sheriff, shall have power to record (B) that which they shall find so done in their presence against the law : by which record the offenders shall be convicted in the same manner and form as is contained in the statute of forcible entries. (C). 13 H. 4. c. 7. s. 1.*

Shall have power to record] And this they may do, whether the offenders be in custody at the same time, or have escaped. 1 *Haw.* 161.

Shall be convicted] And it seemeth to be certain, that the record of a riot, expressly mentioned to have happened within the view of the justices by whom it is recorded, is a conviction of so great authority, that it can no way be traversed, however little ground of truth there might be to affirm, that any riot at all was committed, or however innocent the parties may be of the fact recorded against them. 1 *Haw.* 162.

However it seemeth clear, that if in such a record of a riot it be contained, that the party was guilty therein of a felony, or maim, or rescous, the party shall be concluded thereby as to the riot only, and not as to any of the other matters ; because the justices have by this statute a judicial authority over no other offences, except, riots, routs, and unlawful assemblies. 1 *Haw.* 162.

And inasmuch as such a record is a final conviction of the parties, as to all such matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of persons concerned therein, and the several kinds of weapons made use of by them, and all other circumstances of the fact ; for since the parties are concluded from denying the truth of such a record, and have no other remedy to defend themselves against it, but only by advantage of the insufficiency of what is contained in it, they may justly demand the benefit of excepting to it, if it do not expressly shew, both that they are guilty within the meaning of the statute, and also how far they are guilty, and that the justices have pursued the power given them by the said statutes : and from the same ground it seems also to follow, that such a record may be excepted against, if it do not appear to have been made by the sheriff or under sheriff in concurrence with the justices. 1 *Haw.* 162.

And this record ought to remain with one of the justices, and shall not be left amongst the records of the sessions, it being made out of sessions, and not appointed to be certified thither. *Dalt.* c. 82.

In the same manner and form as is contained in the statute of forcible entries] That is, the statute of the 15 R. 2. c. 2. And hereupon it is said, that the offenders being under the arrest of the justices, and also convicted by a record of their offence, ought immediately to be committed to gaol by the same justices, till they shall make fine and ransom to the king ; which can be assessed by no other justices of the peace, except those by whom the record of the offence was made. 1 *Haw.* 162.

And this fine, Mr. *Dalton* says, the justices shall cause to be estreated into the exchequer, that so it may be levied to the king's use ; and then they are to deliver the offenders again. *Dalt.* c. 82.

But

But Mr. *Hawkins* says, that it hath been questioned whether the justices can safely dismiss the offenders upon their paying such a fine as shall be imposed upon them, without some judgment for their imprisonment as well as fine; because it is enacted by the 2 *H.* 5. c. 8. that such rioters attainted of great and heinous riots, shall have one whole year's imprisonment at the least, without being let out of prison by bail or mainprize; and that the rioters attainted of petty riots, shall have imprisonment as best shall seem to the king or to his council. 1 *Haw.* 164.

4. And if the offenders be departed before the coming of the said justices and sheriff or under sheriff, the same justices, three or two of them, shall diligently inquire (D) within a month after such riot, assembly, or rout of people so made, and thereof shall bear and determine according to the law of the land. 13 *H.* 4. c. 7. f. 1.

The same justices] It is generally said, that any justices of the county may take such an inquiry, whether they dwell near the place where the riot happened, or at a distance, or whether they went to view the riot or not; for the statute ought to be construed as largely as the words will bear, in favour of the justices power in the suppressing of such riots; and therefore those words in the statute that *the same justices shall inquire*, ought to be thus expounded, that the same justices who were before empowered to raise the posse, shall inquire, and that is, any justices in the county. 1 *Haw.* 163.

Shall diligently inquire] That is, by a jury: In order to which, it is enacted by the 19 *H.* 7. c. 13. that the sheriff, on their precept directed to him, shall, on pain of 20*l.* return 24 persons, whereof every of them shall have lands and tenements within the shire, to the yearly value of 20*s.* of charter land or freehold, or 26*s.* 8*d.* of copyhold, or of both, over and above all charges: And he shall return upon every juror in issues, at the first day 20*s.* and at the second 40*s.*

Note; *Charter land* had its name from a particular form in the charter or deed, which ever since the reign of *H.* 8. hath been disused. 1 *Inst.* 6.

Within a month] That is, if they do not make inquiry within a month, they are punishable for the neglect; yet they may inquire after the month: for the lapse of a month doth not determine their authority, but only subjects them to a penalty, 2 *Salk.* 593.

Shall bear and determine according to the law of the land] And therefore they may award process under their own teste, against those who shall be indicted before them of any of the offences abovementioned, according to the form of this statute; and also may award the like process for the trial of a traverse of such an inquisition; and do all other things in relation thereunto, which are of course incident to all courts of record. 1 *Haw.* 163.

And the riot being so found by inquisition, the justices must make a record thereof in writing of such their inquiry or presentment found before them; which record also is to remain with one of the justices. *Dalt.* c. 82.

5. And if the truth cannot be found in the manner as is aforesaid, then within a month then next following, the justices, three, or two of them, and the sheriff or

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or under sheriff, shall certify before the king and his council, all the deed and circumstances thereof; which certificate shall be of the like force as the presentment of 12 men; upon which certificate the offenders shall be put to answer, and shall be punished according to the discretion of the king and his council. 13 H. 4. c. 7. f. 2.

And if they do traverse the matter so certified, the certificate and traverse shall be sent into the king's bench to be tried. id. f. 3.

And if the offence be not found, by reason of any maintenance or embracery of the jurors, then the same justices and sheriff or under sheriff shall in the same certificate certify the names of the maintainers and embracers, with their misdemeanors. 19 H. 7. c. 13.

Shall certify] And it seemeth certain, that such certificate, being in nature of an indictment at the common law, ought to comprehend the certainty of time, place, and persons, and other material circumstances, both of the riot and maintenance. 1 Haw. 165.

Before the king and his council] It seems clear, by the council being here distinguished both from the chancery and king's bench, that the certificate ought to be made to the privy council board, and not to either of those courts, which in some statutes relating to judicial proceedings are taken for the king's council. 1 Haw. 165.

6. And the said justices and other officers shall execute their offices aforesaid at the king's costs, in going and continuing in doing their said offices, by payment thereof to be made by the sheriff by indentures betwixt the said sheriff and justices, and other officers aforesaid, whereof the sheriff upon his account in the exchequer shall have due allowance. 2 H. 5. c. 8.

In order to the defraying of which, the said statute directs the fines of the offenders to be enlarged, and thereout the sheriff may pay the charges of the said justices; and of the jury, that is, for their diet; and the sheriff's fees, and the like. Dalt. c. 82.

7. And the justices dwelling nighest in the county, where such riot, assembly, or rout shall be, together with the sheriff or under sheriff, shall do execution of the said statute of the 13 H. 4. every one upon pain of 100l. to the king. f. 4.

The justices dwelling nighest] Although these only are liable to this penalty, yet if any others on notice shall neglect to supply their default, they are fineable at discretion. 1 Haw. 166.

But if any justices, who do not dwell nearest to the place, do actually execute the statute, they excuse all the rest. 1 Haw. 165.

Dwelling nighest in the county] Therefore if they dwell nighest, but in another county, they are not in danger of this penalty. 1 Haw. 166.

Shall do execution of the said statute] That is, in the whole, and not in part only; as by recording a riot, and not committing the parties. 1 Haw. 166.

VI. How by process out of chancery.

By the 2 H. 5. c. 8. If default be found in the two justices, sheriff, or under sheriff, then at the instance of the party grieved, a commission shall be issued under the great seal, to inquire as well of the truth of the case for the complainant, as of such default.

And by the 2 H. 5. c. 9. and 8 H. 6. c. 14. Rioters shall be taken by writ and proclamation out of chancery, on suggestion of two justices and the sheriff, of the common fame of such riot.

A. Indictment for a riot.

Dublin. **T**HE jurors for our lord the king upon their oath present, that A. O. late of the parish of _____ in the county of _____ yeoman, B. O. late of the same, yeoman, C. O. late of the same, yeoman, and divers other persons (to the jurors aforesaid as yet unknown) on the _____ day of _____ in the _____ year of the reign of _____ at the parish aforesaid, in the county aforesaid, with force and arms, unlawfully, riotously, and routously did assemble and gather together, to disturb the peace of our said lord the king; and so being then and there assembled and gathered together, in and upon one A. I. in the peace of god and of our said lord the king then and there being, unlawfully, riotously, and routously, did make an assault, and him the said A. I. then and there unlawfully, riotously, and routously did beat, wound, and ill treat, and other wrongs to the said A. I. then and there unlawfully, riotously, and routously did; to the great damage of the said A. I. and against the peace of our said lord the king, his crown and dignity.

B. Record of a riot on view.

Dublin. **B**E it remembred, that on the _____ day of _____ in the _____ year of the reign of _____ We J. P. and K. P. esquires, two of the justices of our said lord the king, assigned to keep the peace in the said county, and A. S. knight, sheriff of the said county, at the complaint and request of A. I. of _____ in the county aforesaid, yeoman, in our proper persons have come to the mansion house of him the said A. I. in _____ aforesaid, and then and there do find A. O. of _____ yeoman, B. O. of _____ yeoman, C. O. of _____ yeoman, and other malefactors and disturbers of the peace of our said lord the king to us unknown, to the number of 11 persons, in a warlike manner arrayed, to wit, with clubs, swords, and guns unlawfully, riotously, and routously assembled, and the same house besetting, many evils against him the said A. I. threatening, to the great disturbance of the peace of our said lord the king, and terror of his people, and against the form of the statute in that case made and provided. And therefore we the aforesaid J. P. K. P. and A. S. the aforesaid A. O. B. O. and C. O. do then and there cause to be arrested, and to the next gaol of our said lord the king in the county aforesaid to be conveyed, by our view and record of the unlawful assembly, riot, and rout aforesaid convicted, there to remain every and each of them respectively, until they shall severally and respectively have paid to our said lord the king the several
sum

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sum of 10l. each, which we do impose upon them and every of them separately for their said offence. In testimony whereof, to this our present record we do put our seals. Dated at ———— aforesaid, the day and year aforesaid.

C. Commitment of the rioters upon view.

Dublin. **J.** P. and K. P. esquires, two of the justices of our lord the king, assigned to keep the peace within the said county, and A. S. knight, sheriff of the said county; To the keeper of the gaol of our said lord the king at ———— in the said county, and to his deputy and deputies there, and to every of them greeting.

Whereas upon complaint made unto us by A. I. of ———— yeoman, we did this present ———— day of ———— go to the house of the said A. I. at ———— aforesaid, and there did see A. O. of ———— yeoman, B. O. of ———— yeoman, C. O. of ———— yeoman, and other malefactors to us unknown, assembled together in an unlawful, routous, and riotous manner, to the terror of the people, and against the peace of our said lord the king, and against the form of the statute in that case made and provided: We do therefore send you, by the bringers hereof, the bodies of the said A. O. B. O. and C. O. convicted of the said riot, rout, and unlawful assembly, by our own view, testimony, and record; commanding you in the name of our said lord the king, to receive them into the said gaol, and them and every of them respectively there safely to keep, until they and every of them shall respectively pay to our said lord the king, the several and respective sum of 10l. each, which we have set and imposed upon them, and each and every of them separately for the said offence. Given under our hands and seals at ———— aforesaid, in the county aforesaid, the day and year aforesaid.

D. Precept to summon a jury.

Dublin. **J.** P. and K. P. esquires, two of the justices of our lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, To the sheriff of the said county, greeting. On the behalf of our said lord the king we command you, that you cause to come before us at ———— in the county aforesaid, on the ———— day of ———— next ensuing, 24 honest and lawful men of the county aforesaid, every one of which to have lands and tenements within the said county to the yearly value of 20s. of charter land or freehold, or of 26s. 8d. of copyhold, or of both, over and above all charges, to inquire for our said lord the king, and for our indemnity in this behalf, upon their oath, of certain riots, routs, and unlawful assemblies at ———— in the county aforesaid, lately committed, as it is said; And that you return upon every person so by you to be impanelled 20s. of issues at the aforesaid day, to be by them respectively forfeited if they shall not appear and be sworn to inquire of the premises at the said time and place. And this you shall in no wise omit, on pain of 20l. Given under our hands and seals at ———— aforesaid, in the county aforesaid, the ———— day of ———— in the ———— year of the reign of ————.

Jurors

Jurors oath.

YOU shall true inquiry and presentment make of all such things as shall come before you, concerning a riot, rout, and unlawful assembly said to have been lately committed at ——— in this county; you shall spare no one for favour or affection, nor grieve any one for hatred or ill will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you; So help you God.

The oath which your foreman hath taken on his part, you and every of you shall well and truly observe and keep on your parts; So help you God.

The inquisition, indictment or presentment of the jury.

Dublin. **A**N inquisition for our lord the king, indented and taken at ——— in the county aforesaid, the ——— day of ——— in the ——— year of the reign of ——— by the oath of ——— honest and lawful men of the county aforesaid, before J. P. and K. P. esquires, justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, who say upon their oath aforesaid, that A. O. of ——— yeoman, B. O. of ——— yeoman, C. O. of ——— yeoman, together with other malefactors and disturbers of the peace of our said lord the king, to the jurors aforesaid as yet unknown, on the ——— day of ——— now last past at ——— aforesaid, in the county aforesaid, with force and arms, to wit, with clubs, swords, and guns, unlawfully, routously, and riotously did assemble, to disturb the peace of our said lord the king; and so being then and there assembled and gathered together, the mansion house of A. I. yeoman, at ——— aforesaid, unlawfully, routously, and riotously did enter, and in and upon him the said A. I. then and there unlawfully, routously, and riotously did make an assault, and him the said A. I. then and there unlawfully, routously, and riotously did beat, wound, and ill treat, in disturbance of the peace of our said lord the king, and to the terror of his people, and against the form of the statute in such case made and provided.

*We whose names are hereunto set, the
abovesaid jurors, do find this inquisition true;*

*We the justices abovesaid do hereby impose
the fines here under written, on the
abovesaid offenders;*

A. B.
C. D. &c.

A. O. 20*l*.
B. O. 20*l*.
C. O. 20*l*.

BY the act 25 G. 2. c. 10. If any persons shall wilfully damage or destroy any work made for the use of the navigation already made or carrying on, or which shall hereafter be made or carrying on by virtue of this or *any of* the former acts, upon any navigable river, stream, canal or inland navigation in any part of this kingdom, for the use and conveniency thereof, or for preserving the navigation thereof, all persons so offending being thereof lawfully convicted upon indictment, before the judges of assize where such works or any part of them lieth which shall be so damaged, shall forfeit treble the sum which shall be necessary to be laid out in repairing such work which shall be so damaged, which sum shall be ascertained by the verdict of the jury who shall find any person guilty of any of the offences aforesaid. *§. 10.*

And all persons convicted as aforesaid, shall be committed to close confinement in the common gaol of the county, &c. where such trials shall be had, and shall there remain without bail or mainprize until they pay the sum ascertained by the said jury to the corporation, or to such persons as they shall appoint by writing under their common seal to receive the same, unless such persons shall be discharged by the corporation (*for promoting and carrying on an inland navigation in Ireland*) eleven or more of them being present, by instrument in writing under their common seal.

And if the persons so committed, shall, before they shall be released or discharged as aforesaid, escape, or be seen at large out of such gaol, the sheriffs of the county, &c. to whom such offender shall be committed, shall be answerable to the corporation for the sum ascertained by such verdict, and the corporation is impowered to sue for and recover the same from such sheriffs by civil bill, in case the sum shall not exceed twenty pounds, and in case the sum shall exceed twenty pounds, the corporation shall sue for and recover the same from the sheriffs in any court of record in the four courts of *Dublin*, by action of debt, bill, plaint or information, wherein no essoin, &c. shall be allowed.

It shall be lawful for the collectors of the tolls appointed by the commissioners by virtue of the act (3 G. 2. c. 3.) who shall hereafter be appointed by the said corporation hereby created, for collecting the tolls upon all boats, vessels, goods, merchandises and passengers navigating or passing upon any river or canal, now or hereafter to be made navigable or passable in pursuance of this act or the said recited act, to seize and detain any persons whom they shall find or see actually committing any of the offences before mentioned, and to carry such persons, without any necessary delay, before one justice of the peace for the county, &c. where such offence shall be committed, without any other authority for so doing, and such justice is required to oblige such persons, being charged upon oath with any of the said offences, to give security for their appearance at the next assizes for the county, &c. where such offences shall be committed, and for want of sufficient security to commit the persons so offending to the common gaol of the county where the offence shall be committed until they shall give such security. *§. 11.*

- I. *What it is.*
- II. *Widening of highways to prevent robberies.*
- III. *Assaulting with intent to rob.*
- IV. *Levying hue and cry on a robbery committed.*
- V. *Hundred when liable to answer damages.*
- VI. *Manner of bringing the action against the hundred.*
- VII. *Damages how to be levied and applied.*
- VIII. *Reward for apprehending a robber.*
- IX. *Pardon for discovering an accomplice.*
- X. *Principal and accessory in robbery.*
- XI. *Punishment of robbery.*
- XII. *What shall be done with the goods of which a person is robbed.*

I. *What it is.*

1. **T**HERE are two kinds of robbery; from the *person*, and from the *house*: It is the former of these that is treated of under this title: Two kinds of robbery.
the latter, *viz.* robbery from the house, belongeth to the titles **Larceny**
and **Burglary**.

2. Robbery, lord Coke says, is derived from the *French de la robe*, both Derivation of the word robbery.
because they bereave the true man of his *robes*, and also for that his money
is taken by them from some part of his garment, or robes about his person.
But in truth the word seems to be much ancients than the introduction
of the *French* into our language; and probably was deduced unto us through
the channel of *Saxony* or *Denmark*. *Robber*, in the *Saxon* is *reofere*; in the
Low Dutch, *roover*; in the *Danish*, *roffure*; by a transmutation of the letters
b, *f*, and *v*, frequent in all kindred languages. The *Gothick* translation of
the gospels useth *biraubodedun* to signify *they robbed*, from *birauban*, *to rob*;
which being stripped of the prefix augmentative is *rauban*. The *Saxons* ex-
pressed the same by *bereafodon*, which we still preserve when we say *they*
bereaved; and in the northern parts of *England*, the words *robbing* and
reaving are still used promiscuously to signify rapine and plunder; and when
the violent winds do strip a house of its thatch or covering, it is called
reaving.

3. Robbery is a felony by the common law, committed by a violent assault Definition of robbery.
upon the person of another, by putting him in fear, and taking from his person,
his money or other goods, of any value whatsoever. 3 Inst. 68.

By putting him in fear] In the case of *Macdaniel* and others, at the *Old*
Baily sessions in December 1755, *Stephen Macdaniel*, *John Berry*, *James Eagen*,
and *James Salmon*, were indicted as accessaries before, to a robbery commit-
ted by *Peter Kelly* and *John Ellis* on the person of the said *James Salmon*.
The jury found a special verdict, that *Kelly* and *Ellis* were convicted of the
said

said robbery; that before the robbery, all the prisoners and one *Thomas Blee*, in order to procure to themselves the rewards given by act of parliament for apprehending robbers, did meet at the *Bell* inn in *Holbourn*, and agreed that the said *Blee* should procure two persons to commit a robbery on the prisoner *Salmon*; that for that purpose, they contrived that *Blee* should inform the persons so to be procured that he would assist them in stealing some linen in the parish of *St. Paul, Deptford*; that in pursuance of this agreement, and with the privity of all the prisoners, the said *Blee* did procure *Ellis* and *Kelly* to go with him to *Deptford* in order to steal linen, but did not at any time before the robbery inform them of the intended robbery; that they went with *Blee* to *Deptford*, and the prisoner *Salmon* being likewise waiting there in pursuance of the agreement, they robbed him of the money and goods mentioned in the indictment: They further find, that none of the prisoners had any conversation with *Ellis* and *Kelly* previous to the robbery, but that *Mac-daniel*, *Eagen*, and *Berry* saw them and approved of them as proper for the purpose of robbing *Salmon*. This was argued before all the judges; who were unanimously of opinion, that supposing a robbery to have been committed, all the prisoners were guilty as accessaries before, except *Salmon* who could not be accessary to the robbing of himself; but forasmuch as the goods were taken from *Salmon* in pursuance of the agreement beforementioned, they were of opinion that in legal construction he was not robbed at all, since it is of the essence of robbery, that the goods be taken against the will of the owner; altho' the circumstance of putting in fear is perhaps not necessary to be inserted in the indictment, at least it need not to be strictly proved, for if a man is knocked down without any previous warning and thereby rendered insensible, or if he manfully resists and is overpowered without being under any fear at all, it is not the less robbery upon that account. And the prisoners were discharged of the indictment. — But afterwards an indictment was found against them, and prosecuted at the expence of the crown on the representation of the judges, for a conspiracy; in which the principal facts found by the special verdict in the robbery bill were charged. On this indictment they were all convicted; and the court gave judgment, that they be all set in and upon the pillory twice; that they stand committed for 7 years, and until they find sureties for their good behaviour for 3 years afterwards. One of them (*Eagen*) lost his life in the pillory, thro' the resentment of the populace. And on that account, the others did not stand a second time. But they were all in *Newgate* very closely confined in pursuance of their sentence. *Fost. 121.*

And taking from his person] Taking a thing in a man's presence, is in law a taking from the person. *Hale's Pl. 73. Str. 1015. K. against Francis and others.*

Thus, if one take or drive my cattle out of my pasture, in my presence, this is robbery, if he make an assault upon me, or put me in fear. *Hale's Pl. 73.*

II. Widening of highways to prevent robberies.

Highways leading from one market town to another, shall be enlarged, ^{Word near highways,} so that there be neither dyke, tree, nor bush, except ashes or great trees, whereby a man may lurk to do hurt, within 200 foot of each side. And if by default of the lord, that will not avoid the dyke, underwood, or bushes, any robberies be done, the lord shall be answerable for the felony; and if murder be done, the lord shall make a fine at the king's pleasure. And if a park be taken from the highway, it shall be set at 200 foot distance; or else a fence shall be made, so as offenders may not pass nor return to do evil. 12 Ed. 1. ft. 2. c. 5.

It is observable, that when this act was made, the country was fuller of wood than it is at present.

III. Assaulting with intent to rob.

1. If any person shall with any offensive weapon assault, or by menaces, ^{Assaulting with intent to rob.} or in any forcible or violent manner, demand any money or goods, with a felonious intent to rob him, he shall be guilty of felony, and be transported for seven years. 7 G. 2. c. 21.

2. If any person be indicted, or appealed, for killing any person attempting to rob, he shall be acquitted. 24 H. 8. c. 5. ^{Killing a person intending to rob.}

IV. Levying hue and cry on a robbery committed.

Immediately upon robberies committed, fresh suit shall be made from ^{Hue and cry.} town to town, and from county to county. 13 Ed. 1. ft. 2. c. 1.

V. Hundred when liable to answer damages.

1. The hundred where the offence was committed, shall be answerable ^{Hundred shall answer.} for the robberies, and for the damages if the offender be not taken. 13 Ed. 1. ft. 2. c. 2. 28 Ed. 3. c. 11.

2. Also, a new highway changed for an ancient one, without a writ of ^{Not for a robbery in a new highway.} *ad quod damnum*, and an inquisition found thereon, is said to be not such a highway, in which the inhabitants are bound to watch, nor to make amends for a robbery therein committed. 1 Haw. 202.

3. Likewise if any person, which shall travel upon the lord's day, shall ^{Nor if on the lord's day.} be then robbed; the hundred shall not be liable: nevertheless they shall make hue and cry, on pain of forfeiting to the king as much as might have been recovered against the hundred, if the robbery had not been on the lord's day. 7 W. 3. c. 17. s. 6.

Which shall travel M. 7 G. *Tasbmaker* against the hundred of *Edmonton*. The plaintiff lived a mile or two from the church, and going thither with his lady in his coach upon a *sunday*, was robbed; and brought his action against the hundred, and recovered; for the statute extends only to the case

case of *travelling* : But *Pratt Ch. J.* said, if they had been going to make visits, it might have been otherwise. *Str. 406. Comyns. 345.*

Nor if it be in
an house.

4. Also, if any man be robbed in his house, the hundred shall not be charged therewith, whether it were done by day or night ; because every man's house is his castle, which he ought to defend ; and if any one is robbed in his house, it shall be esteemed his own fault. *Dalt. c. 84.*

Nor if it be in
the night.

5. Also, a robbery done in the night, shall not charge the hundred ; but yet if it be done in the day time, or there be so much day light as that one may see a man's face, so that the robber may be known, though it be before the sun rising, or after the sun setting, the hundred shall answer for it. *Dalt. c. 84.*

VI. Manner of bringing the action against the hundred.

In order to make the hundred liable, these things following must be done :

Notice to the
inhabitants.

1. *The person robbed shall, with as much convenient speed as may be, give notice thereof, unto some of the inhabitants near the place.* 10 C. 1. ff. 4. c. 13. f. 8.

And though that place where notice is given, be in another hundred or county, yet it is good enough : for a stranger may not know the confines of the hundred or county : and that hundred where notice is given must make hue and cry, and by that means the hundred where the robbery was committed will soon know thereof. *Cro. Ca. 41, 379. 3 Salk. 184.*

To be exa-
mined on oath.

2. *He shall also be examined on oath within twenty days next before the action brought, before a justice in or near the hundred, whether he knows any of the robbers ; and if he confesses that he does, he shall before the action brought, be bound over by the said justice to prosecute.* 10 C. 1. ff. 4. c. 13. f. 8.

He shall also be examined] That is, the party robbed, who is to bring the action, shall be examined. But here note a diversity. *T. 2 Car. Raymund* and hundred of *Oking*. The servant was robbed of his master's goods, and the servant made oath before a justice, and the master brought the action against the hundred. By the court ; The action well lies for the master ; and the servant's oath is sufficient, for it was properly in his notice, that he was robbed, and did not know any of the robbers, and the master knows it not that he was robbed, or who were the persons, but by report of his servant ; and it would be inconvenient, if the master should not bring the action, but the servant only ; for the servant might release, or compound, or discontinue the suit, and so the master should have the loss by his falsehood : therefore the master shall bring the action, and have his servant who was robbed, to be his witness. *Cro. Car. 37.*

Within 20 days next before] And the time of making such oath must be laid in the declaration, for that is traversable. *3 Salk. 184.*

Before a justice] And if the justice shall refuse upon his request, to examine him, an action will lie against the justice ; because he doth not act therein

therein as a judge of record, but as a minister appointed for the examination by the statute. *Cro. Car.* 211.

Whether he knows any of the robbers] *H. 19 G. 2. William King* against the hundred of *Bishop's Sutton*. In an action brought against the hundred, the oath proved was, that he had *good reason to suspect* the fact was done by *Robert Gibbs* and *William Langford*, both of such a parish. And a doubt arising at the assizes, whether this was sufficient or not, a case was made, and twice argued at the bar. And upon the second argument, the court were of opinion, that the examination did not maintain the action. The oath required is a condition precedent, and for the sake of the hundred, and to prevent screening the offenders. There is a great deal of difference between *suspecting* and *knowing*: a man who *knows* the offender may purposely stop at the word *suspect*; to avoid being bound to prosecute: and though it would be equivocating, yet it would hardly be perjury assignable; it being only a suppression of part of the truth. He should have said, *I suspect them to be the men, but I do not know it*. It will be dangerous to let them go out of the words of the act, and therefore the plaintiff failed in the action, and paid the costs of a nonsuit. *Str.* 1247.

3. And by the 7 *W. c.* 21. No person shall recover any damages by virtue of this act, unless they by themselves, or by their servants, within twenty four hours after the robbery or injury done them by any robbers, tories, or rapparees, or within reasonable time after he shall be at liberty, shall give notice of such robbery unto some of the inhabitants of some town, village, or hamlet, near unto the place where such fact shall be committed. *f. 4.*

And shall within four days after such notice give in their examination upon oath, or of their servants that were in their house, or that had the care of his goods, before some justice of the peace inhabiting within the barony where the said fact shall be committed, or near unto the same, whether they do know the persons that committed such fact, or any of them; and if upon such examination it be confessed, that they do know the persons, or any of them, they shall be bound by recognizance to prosecute such offenders according to law.

4. Before any action shall be commenced on this act, for recovery of damages for any losses sustained by reason of any robbery, the persons so injured shall procure a presentment to be made at the next assizes or quarter-sessions to be held after such robbery or fact committed, by the grand jury of the county, wherein notice shall be taken of such robbery, or other injuries or mischiefs, and of the losses sustained, the number of the offenders, and how many of them are papists and how many protestants, or reputed such, as also of the baronies and county where such fact was committed, with the names of the offenders. *f. 5.*

But where the persons robbed or their servants do not know the names of all or any of the offenders, and shall declare so on their oath openly in court, the grand jury in such presentment, to give the best description they can on the evidence produced before them of such malefactors, to the end they may be brought the speedier to justice, which presentment shall be given in evidence by the persons that shall obtain the same, on any trial for damages for his losses sustained, according to this act.

This

This act, so far as it is not altered by st. 6 G. 1. c. 12. is continued by st. 29 G. 2. c. 8. s. 2. for twenty one years, and to the end of the then next session.

M. 16 G. 2. Ball against the hundred of Wymerley. Upon a case made at the assizes, it was stated, that soon after six in the morning, the plaintiff was robbed at two miles and a half distance from *Northampton*, and the highwayman cut his bridle and stirrups, threw them into a ditch, and turned his horse loose; that the plaintiff recovered them, remounted, rode through a village called *Cotton*, where he gave no notice, met three men on the road whom he informed of the robbery, and arrived at *Northampton* by seven o'clock, and gave notice to an innkeeper there, from whence he went to *Rotherthorpe*, three miles off, where the high constable lived, and between eight and nine gave notice. And whether this notice was sufficient to maintain the action, was the question. And the court on argument held it to be good notice, for the high constable is the properest person to go to, and it is not required that he go to the next constable. It appears the plaintiff lost no time, considering the circumstances he was in; and *Rotherthorpe* is not at such a distance, but that it may come within the meaning of the word *near*. So the plaintiff had judgment. *Str. 1170.*

5. But by the 6 *Ann. c. 11.* All persons pretending to be robbed, shall not only give notice thereof to some neighbouring justice of the peace, as is already provided by a former act, but shall likewise on all robberies, within five days after the fact, give notice to the high constable of the barony where such robbery shall be alledged to be committed; and in case such robbery be committed in the division of any two baronies, then to the high constables of both the said baronies, who are respectively required forthwith to publish the same in all the market towns of the baronies where such robberies are said to be committed. *s. 2.*

6. And every presentment for any robbery to be hereafter made by virtue of this or the former act, shall be at the next assizes after such robbery committed, and not at any other assizes afterwards, unless such robbery shall be committed so near to the time of holding such assizes, that no due notice can be given of such robbery before the first day of such next assizes, according to the direction of this and the former acts; in which case it shall be lawful for the person robbed to prefer his petition, and to obtain such presentment at the next assizes, after such due notice shall be given. *s. 7.*

This act, so far as it is not altered by st. 6 G. 1. c. 12. is continued by st. 29 G. 2. c. 8. with the alterations and additions, made by st. 9 G. 2. c. 6. for twenty one years, and to the end of the then next session.

7. Also, by the 9 *G. 2. c. 6.* All robberies committed by privateers during the time of war with any popish state or prince, and losses sustained thereby by any persons, shall be presented at the next general assizes for the county where such robbery shall be committed, by the grand jury of such county, after due notice given thereof, according to the laws already in being, in cases where persons are robbed. *s. 5.*

And

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And after such presentment, such orders shall be made at assizes for the relief of persons so robbed by privateers, and for the reimbursing them such losses, and for applotting and levying the same on the lands, goods, and chattels of all the popish inhabitants of the county where such robbery shall be committed, in the same manner as money is to be levied for robberies by tories, robbers, or rapparees, who are papists, by any law now in being.

This act is continued, by ft. 29 G. 2. c. 8. for twenty one years, and to the end of the then next session.

VII. Damages how to be levied and applied.

1. By the act 10 & 11 C. 1. c. 13. After execution of the damages by the parties robbed, it shall be lawful, upon complaint made by the parties charged, for two justices of the peace, whereof one to be of the *quorum* of the same county, inhabiting within the hundred or barony, or near unto the same where such execution shall be had, to assess all the towns, parishes, villages, and hamlets, as well of the said hundred or barony where such robbery shall be committed, as of the liberties within the said hundred or barony, to an equal contribution for the relief of the inhabitants against whom the parties robbed had their execution. *f. 3.*

And after such taxation made, the constables or headboroughs of every such town, &c. shall have power to assess, according to their abilities, every inhabitant towards the payment of such taxation as shall be so made upon every such town, parish, &c. by the said justices.

2. And if any inhabitant shall obstinately refuse to pay the said assessment so by the constables or headboroughs assessed, it shall be lawful for the constables and headboroughs to distrain every person so refusing, and the distress to sell.

3. The constables and headboroughs, after they have collected the said rates, shall within ten days pay the same over unto the justices of peace, or one of them, to the use of the inhabitants for whom such assessment shall be made; which money shall by the justices receiving the same, be delivered upon request unto the said inhabitants. *f. 4.*

4. The like assessment shall be had within every hundred and barony where default of pursuit shall be, for the benefit of all inhabitants of the same hundred or barony where such default shall be, that shall by virtue of this act have any money levied of them, for the payment of half of the money recovered against the said hundred or barony where any robbery shall be committed. *f. 5.*

5. And by the 7. W. c. 21. Every person robbed may sue for and recover their damages against any inhabitant of the said county or barony, who by this act shall be made liable to answer any part thereof; and after such recovery and execution against the said inhabitants, all other the inhabitants of the said barony or county, who by this act shall be made liable to the said damages, shall be rateably taxed towards an equal contribution for the relief of such inhabitant, against whom the said recovery and execution is had, which tax shall be made, levied, and raised, by such means

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means as is prescribed in a former statute, *for the following of hue and cry*, made in the tenth and eleventh years of king *Charles* the first. *f. 3.*

6. Also, by the 9 *W. c.* 34. Where any person is by the former act intitled to recover satisfaction for any damage suffered by any robber, tory, or rapparee, such person may pursue his remedy for recovery of such satisfaction, at the next assizes to be held for the said county where such offence was committed, before the judges of assize and grand jury of the said county, in the method following, that is to say, the persons so robbed shall at the said assizes exhibit to the judges of assizes their petition, therein praying such satisfaction, and shall set forth the time and place when and where such robbery was committed, or other injury done, the several particular goods lost, or other damages suffered, and the particular value thereof, and by what number of persons such robbery was committed, or injury done, and of what religion such offenders or any of them were, with the names and descriptions of such of the said offenders as he doth know, and such particular descriptions of such others of them as he can give. *f. 2.*

And the said matter shall thereupon be examined by such judges of assizes in open court, in the presence of such grand jury, on the oath of the party robbed or injured, and such other evidence as can be produced touching the said facts; and the grand jury are required, on consideration of the said matter amongst themselves, to make such presentment touching the same, and of such sums of money as the persons so robbed or injured ought to have for such loss, injury, or damage, and by what persons, whether papists or protestants, and in what proportions for each of them, the same ought to be paid.

For which sum so presented process shall issue, in the nature of an execution, against any inhabitants of the said county chargeable therewith; and all the inhabitants of the said county, who shall by such presentment be made chargeable with the said damages, shall be rateably taxed towards an equal contribution for relief of such inhabitants against whom such process is had; which tax shall be levied by such means as is prescribed in a former statute, *for the following hue and cry*, made in the tenth and eleventh years of king *Charles* the first.

7. Provided, that if any persons shall find themselves aggrieved by any presentment to be made in pursuance of this or the former act, such persons, in case the sum presented to be raised do exceed five pounds, may at the said assizes traverse the same, which traverse shall be tried at the same or the next assizes, as the judges who shall allow the same shall think fit. *f. 3.*

And if on such traverse the issue shall be found for the traverser, such presentment shall be discharged; and if the issue shall thereupon be found against the traverser, they shall pay to the persons on whose behalf the presentment was made, twenty shillings costs, and the said presentment shall thereupon be conclusive to all persons.

8. No such presentment shall be removed by *certiorari*, or the prosecution thereupon otherwise delayed than by such traverse, and that for such time only as shall be necessary for the trial of such traverse, nor shall any such presentment be quashed for any informality. *f. 5.*

9. And

9. And also by 6 *Ann. c. 11*. Whereas the principal inhabitants of each parish are summoned to applot on the inhabitants within their respective parishes, the money ordered at the assizes, to be levied off the county, for the reimbursing the persons that are robbed, and do usually lay the whole burthen on the poorer sort, the party grieved by such apportionment may appeal to the next going judges of assize, who upon examination upon oath in open court, of the matters complained of, shall determine the same, and make such order, and award such costs as they shall think fit, such costs to be levied and recovered as costs in civil bills. *f. 3.*

In case any of the said persons shall make over, or dispose of their substance, in order to evade the payment of their proportions, such conveyance shall be looked on as fraudulent; and upon the complaint of the respective high constable, one of the neighbouring justices of the peace shall send their warrants for such persons, and commit them to gaol until they pay, or give security for the payment of the money so applotted on them, subject to such appeal as aforesaid. *f. 4.*

10. And moreover by the 6 *G. 1. c. 9*. Where any presentment shall hereafter be made for any money *to persons robbed*, the grand jury who make such presentment, shall at the time of so doing, name the persons against whom execution shall issue, of the barony or adjacent barony where the robbery was committed; which money so to be raised, shall be applotted by the high constables of the several baronies equally on the holdings and possessions, as well of those protestants and papists who are not inhabitants within the said county, as of those who are resident therein, which applotment shall be made with all convenient speed, so that it may be laid before and approved by the justices of the peace at the next quarter-sessions after such presentment made, and after their approbation thereof, execution shall issue against the persons or their goods, who shall be named by the grand jury for paying the money so presented. *f. 6.*

11. Provided such person so presented be not taken into actual execution until forty one days after such money shall be so applotted, and confirmed by the justices, as is herein before appointed. *f. 7.*

VIII. Reward for apprehending a robber.

1. By the 6 *G. 1. c. 12*. It shall be lawful for any grand jury to raise as a reward for the taking and apprehending of any tory, robber, or rapparee, who shall be proclaimed, any sum not exceeding twenty pounds, whether such tory, robber, or rapparee shall be taken or convicted in the same, or in any other county. *f. 8.*

2. And also by 8 *G. 1. c. 9*. Where any murder or robbery shall be committed in the streets of the city of *Dublin*, or in other counties of cities, or counties of towns, or the liberties thereunto belonging or adjoining, or in the highway of any county, a reward not exceeding twenty pounds shall be given to such persons as shall apprehend such murderer or robber, so as he or she shall be convicted thereof, the same to be raised by presentment of the grand juries of such counties of cities, and counties of towns, or county at large, where such fact shall be committed, and the money so to be raised, to be applotted and levied as other public money, to be distributed between the persons claiming such reward, in such proportion

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portion as to the judges or justices before whom such murderers or robbers shall be convicted shall seem reasonable, and be certified under their hands.

f. 3.

3. And by 17 G. 2. c. 6. A sum not exceeding five pounds, shall be given as a reward to any who shall apprehend and prosecute to conviction, any person guilty of robbery in any part of this kingdom, for which no reward was given by any former law before the making the said act of parliament; which sum shall be raised by presentments of the grand jury, at the assizes of the county wherein such robbery shall be committed, as other county charges are raised, or at the quarter sessions for the county of *Dublin*, or county of the city of *Dublin* respectively, if such robbery shall be committed there. *f. 4.*

IX. Pardon for discovering accomplices.

1. By the act 9 W. c. 34. If any person who hereafter shall commit any robbery or burglary, shall, while he is at large, and before he shall be apprehended or in custody for such offence, make discovery of any two or more of such robbers, tories, or rapparees, being also at large, and not in custody, so as such two or more robbers, tories, or rapparees, shall thereupon be apprehended and convicted for such offence, or shall kill any two or more of such tories or robbers as shall be indicted and proclaimed, according to the said former act, and be out on their keeping at the time of such their being killed; the persons so making such discovery, or killing such robbers or tories, shall not be proceeded against for any robbery or burglary committed before the making such discovery or such killing, but shall receive his majesty's pardon for the same, which shall also be a good bar to any appeal to be brought for such robbery or burglary.

2. And by the 4 G. 1. c. 9. If any person who shall commit any robbery or burglary, shall, while he is at large, or before he is apprehended for such offence, make discovery of any one or more of such robbers, tories, or rapparees, being also at large and not in custody, so as such robber, tory, or rapparee shall thereupon be apprehended and convicted for such offence, or shall kill any one of such tories or robbers who shall be indicted and proclaimed according to the former act, and shall be out on their keeping at the time of their being killed, such person so making such discovery, apprehending, and convicting, or killing any one of such robbers or tories as aforesaid, shall not be proceeded against for any robbery or burglary by him committed before making such discovery, apprehending, and convicting, or such killing as aforesaid, but shall have his majesty's pardon for the same, which pardon shall in such case also be a good bar to any appeal to be brought for such robbery or burglary. *f. 13.*

This act, so far as it relates to the apprehending and killing of proclaimed tories and robbers, is continued by st. 29 G. 2. c. 8. for twenty one years, and to the end of the then next session.

X. Principal

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X. Principal and accessory in robbery.

All that come in company to rob, are principals, though one only actually do it. *Hale's Pl.* 72.

XI. Punishment of robbery.

1. Robbery is generally excluded from the benefit of clergy. 3 *Inst.* 68. 2 *Haw.* 531—537. 2 *H. H. c.* 48.

2. And by the 20 *G. 2. c.* 52. Robbery is excepted out of the general pardon.

3. By the 22 *G. 2. c.* 33. Robbery in the navy shall be punished with death, or otherwise, as a court martial, on consideration of circumstances, shall find meet.

4. And by the 21 *G. 2. c.* 12. If any person shall with any offensive weapon or instrument assault, or shall by menaces, or in any forcible manner, demand any money, goods, or chattels from any person, with intent to rob such person; and every person so offending being thereof convicted, shall be adjudged guilty of felony, and shall be liable to be transported, as in cases of felony, and the courts before whom they shall be convicted, shall have power of transporting such offenders for seven years, in like manner as other felons may be transported to any of his majesty's colonies or plantations in *America*, by any law for that purpose now in being. *s.* 1.

5. If any such offender ordered for transportation by virtue of this present act, shall break gaol or escape before such transportation, or shall return into any part of *Great Britain* or *Ireland*, before the expiration of the said seven years, such persons being thereof convicted, shall suffer death as felons, without benefit of clergy. *s.* 2.

XII. What shall be done with the goods of which a person is robbed.

1. If the person robbed doth not prosecute the robber; if his goods are waived in flight, or seized by the king's officers, or lord of the manor, he shall not have them restored. *Keilw.* 49.

2. But if they are not waived in flight, nor seized by the king's officers, or lord of the manor, he may take his goods again wherever he finds them, without the formality of restitution being awarded, if they be not sold in open market; and this also, although he doth not prosecute the robber. *Keilw.* 48.

3. But if he shall prosecute the robber to conviction; he shall have restitution, although they have been waived, and seized, and even sold in open market. *Keilw.* 48.

4. By the act 9 *W. c.* 34. When any of the goods, for which the party robbed hath received satisfaction by presentment, shall be discovered, so as the same, or satisfaction for them may be recovered, the persons upon whom the sum so presented was levied, shall have the property thereof, and they may maintain such action, and pursue such remedy for getting such

such goods as the persons robbed might have had before such satisfaction received. *ſ. 6.*

Such goods, after the same shall be recovered, to be sold for the most the same will yield, and the money, after the charges for the recovery thereof are deducted, to be distributed and paid proportionably unto the several persons so taxed, towards the payment of the sum contained in the said presentment, according to their several taxations; such sale and distribution to be directed by the justices of the peace signing such taxation.

Examination of the person robbed, before the action brought.

Dublin. **T**HE examination of A. I. of ——— in the county aforesaid, yeoman, taken on oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, dwelling in [or, near to] the hundred of ——— within the said county, the ——— day of ——— in the year of the reign of ———

*Who saith, that on Monday the ——— day of this present month of ——— between the hours of two and three in the afternoon of the same day, at or near a place called ——— he was assaulted in the highway there leading from ——— to ——— by two horsemen, whereof one was a tall lusty man, wearing a black wig, and a blue grey coat, mounted on a bay gelding about fifteen hands high, with a black mane and tail, and star in his forehead; and the other a middle sized man, of a swarthy complexion, having a large scar on his left cheek, having on a dark brown riding coat, and mounted on a black gelding; and by them robbed in the highway aforesaid of the sum of ——— in money, one silver watch of the value of 4*l.* and one pocket book: And that he the said A. I. at the time of the said robbery committed, did not know, nor yet doth know, either of the said persons who committed the same: And that he is since informed, that the said highway and place where he was robbed as aforesaid, are in the parish of ——— and within the hundred of ——— in the said county.*

Taken, made, and signed the day and year above written, before me

J. P.

A. I.

Indictment for a robbery.

Dublin. **T**HE jurors for our lord the king upon their oath present, That A. O. late of ——— in the county of ——— labourer, on the ——— day of ——— in the ——— year of the reign of ——— with force and arms, at ——— in the county of ——— in the king's highway there, upon one A. I. in the peace of god and of our said lord the king then and there being, feloniously did make an assault, and him the said A. I. in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously did put, and one gold watch of the value of ——— of the goods and chattels of him the said A. I. from the person, and against the will of the said A. I. in the highway aforesaid, then and there feloniously and violently did steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Note, the form of a warrant for apprehending a robber upon fresh suit, is inserted under the title **Hue and cry.**

By

BY the *En. st. 21* *f. c. 28. s. 7.* No sanctuary or privilege of sanctuary, shall be admitted or allowed in any case.

Schoolmasters.

NONE shall teach school, unless allowed by the bishop, on pain of the censures of the church: and curates desirous to teach, shall be licenced before others, except where there is a publick school founded.

Can. 77, 78.

2. How far schoolmasters, being protestant dissenters, are exempted, as such, from the penalties inflicted by the laws for teaching school without licence, is treated of under the title **Dissenters**.

Licence of schoolmasters.
Dissenters teaching without licence.

3. By the act, 17 & 18 C. 2. c. 6. s. 7. Every schoolmaster keeping any publick or private school, and every person instructing or teaching any youth in any house or private family, as a tutor or schoolmaster at or before their admission, shall subscribe the declaration or acknowledgment following; *scilicet,*

I A. B. do declare that I will conform to the liturgy of the church of Ireland as it is now by law established;

4. Which declaration and acknowledgment shall be subscribed before the respective archbishop, bishop, or ordinary of the diocese, by every person hereby enjoined to subscribe the same, upon pain that the persons failing in such subscriptions shall loose such his school, &c. and shall be *ipso facto* deprived of the same. s. 8.

5. Every school-master or person instructing or teaching youth in any private house or family as a tutor or school-master, shall be required to take the oath of allegiance and supremacy, which oath is to be administered by the ordinary.

6. If any school-master or other person instructing or teaching youth in any private house or family as a tutor or school-master, shall instruct or teach any youth as a tutor or school-master, before licence obtained from his archbishop, bishop, or ordinary of the diocese, according to the laws of this kingdom, for which he shall pay twelve pence only, and before such subscription made, and before such taking of the oath of allegiance and supremacy, every such school-master, &c. shall for the first offence suffer three months imprisonment, and for every other such offence shall suffer three months imprisonment and also forfeit to his majesty five pounds. s. 9.

7. And by the 7 W. c. 4. s. 10. One act of parliament made in the twenty eighth year of king Henry the eighth, called *an act for the English order habit and language*, whereby it is enacted that every incumbent of each parish within this kingdom, shall keep or cause to be kept within the place or parish where he shall have benefice or promotion, a school to learn *English*; and also one other act made in the twelfth year of queen Elizabeth, intituled, *an act for the erection of free-schools*, whereby it is provided that:

that a public *latin* free-school shall be constantly maintained within each diocese of this kingdom, which have generally been kept but have not had the desired effect, by reason of *Irish* popish schools being too much connived at, and all other statutes now in force concerning schools, shall be strictly put in execution, and for the more effectual doing thereof, the justices of his majesty's court of king's-bench each term, and the judges of assize in their respective circuits, and the justices of the peace in their general sessions of peace are required to give this and the said former acts in charge to the several grand-juries, and to be very circumspect in seeing the same put in due execution. See *Tit. Popery*.

8. Also, by the 8 *Ann. c. 3*. Whatsoever person of the popish religion shall publickly teach school, or shall instruct youth in learning in any private house, or shall be entertained to instruct youth as usher, under master, or assistant, by any protestant school-master, he shall be esteemed to be a popish regular clergyman, and be prosecuted as such, and incur such penalties and forfeitures as any popish regular convict is liable unto by the laws. *f. 16*.

9. And no person shall be qualified to keep school publickly, or teach and instruct youth in any private house, or as usher or assistant to any protestant school-master, who shall not first, or at the next general assizes, or quarter-sessions for the county where such person shall reside after such person is so entertained, take the oath of allegiance, and make, and subscribe the declaration, and take, and subscribe the oath of abjuration as in the act 2 *Ann. c. 6*. against the further growth of *popery* is directed.

10. And if any person shall offend herein, he shall forfeit ten pounds for every such offence; and if any person shall entertain any one not qualified as aforesaid as tutor, under-master, usher, or assistant, he shall forfeit ten pounds for every such offence, the one moiety of which forfeitures shall go to the informer, the other moiety, the expence of the prosecution being first deducted, to the use of the poor of the parish where such offence shall be committed, to be recovered in a summary way by civil bill before the judges of assize, and for the county and county of the city of *Dublin*, such forfeitures to be recovered before the justices of the peace at their quarter-sessions.

11. 2 *G. 1. c. 17*. The like remedy shall be allowed to all licensed school-masters and school-mistresses, for recovery of wages due to them for teaching children, as is by this act allowed to servants, artificers, &c. *f. 10*.

Schoolmaster
by correction
killing his scholar.

12. Where a school-master, in correcting his scholar, happens to occasion his death; if in such correction he is so barbarous as to exceed all bounds of moderation, he is at least guilty of manslaughter; and if he make use of an instrument improper for correction, and apparently endangering the scholar's life, as an iron bar, a sword, or kick him to the ground, and then stamp on his belly, and kill him, he is guilty of murder. 1 *Haw.*

73, 74.

1. **N**O lifted seamen shall be taken out of his majesty's service, by any process, other than for some criminal matter, unless affidavit be first made, that the debt or damage amounts to 20*l*. *Br. ft. 31 G. 2. c. 10. s. 28.* In what cases they may be arrested.

But the plaintiff may, on notice first given to the defendant, enter a common appearance, and proceed to judgment and outlawry, and have execution other than against his body. *s. 29.*

2. No court martial may punish or try any offence committed by any seaman in his majesty's service, which shall not be committed on the main sea, or in great rivers beneath the bridges, or in a haven or creek within the jurisdiction of the admiralty; except in the case of spies, or of mutiny and desertion, or disobedience, or of offences committed on land in foreign countries. *Br. ft. 22 G. 2. c. 33. s. 40.* What offences the court martial may punish.

3. Seamen who have been employed in the king's service since the accession of king *George* the second, and not deserted, may set up and exercise such trades as they are apt for, in any town or place in *Great Britain* or *Ireland*, without molestation (except in *Oxford* or *Cambridge*); and if any person is sued thereupon, and the plaintiff is cast, such person shall have double costs. *Br. ft. 22 G. 2. c. 44. 3 G. 3 c. 8.* Where they may exercise trades.

4. A seaman, instead of being committed to the house of correction, for default of paying the penalty for swearing, shall be put in the stocks for one hour for every single offence, and for any number of offences of which he shall be convicted at one and the same time, two hours. *19. G. 2. c. 21. s. 5.* Convicted of swearing.

5. By the *Br. ft. 31 G. 2. c. 10.* Whosoever willingly and knowingly shall personate or falsely assume, or procure any other to personate or falsely assume, the name or character of any officer, seaman, or other person, intitled or supposed to be intitled to any wages, pay, or other allowances of money, or prize money, for service done on board of any of his majesty's ships or vessels; or willingly and knowingly shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, or seaman, or other person, in order to receive any wages, pay, or other allowances of money or prize money as aforesaid; or shall forge or counterfeit, or procure to be forged or counterfeited, any letter of attorney, bill, ticket, certificate, assignment, last will, or any other power or authority, in order to receive any such wages, pay, or other allowances of money or prize money as aforesaid; or shall willingly and knowingly take a false oath, or procure any other person to take a false oath, to obtain the probate of any will or letter of administration, in order to receive the payment of any wages, pay, or other allowances of money, or prize money due, or that were supposed to be due to any such officer, seaman, or other person as aforesaid, who has really served, or was supposed to have served, on board of any of his majesty's ships or vessels; every such person so offending shall be guilty of felony without benefit of clergy. *s. 24.* Personating seamen in his majesty's service, or their executors or administrators.

6. In like manner by the *Br. ft. 3 G. 3. c. 16.* Whoever shall personate or falsely assume the name and character of an out pensioner of *Greenwich* hospital, in order to receive the out pension due to him, or procure Out-pensioners of Greenwich hospital.

cure any other to do the same, shall be guilty of felony without benefit of clergy.

And in order to receive their pension half yearly as it shall become due, such pensioners shall, together with the printed bill delivered to them by the commissioners, produce a certificate under the hand of the minister and churchwardens where they reside, that such person is, to the best of their knowledge and belief, the person named in such bill.

Concerning
seamen in the
merchants service.

7. Concerning seamen in the merchants service, it is enacted by the 5 G. 2. c. 13. that no master of a ship shall proceed on a voyage, without agreement in writing with each mariner (apprentices excepted), to be signed by such mariner, for wages, on pain of 5*l.* for each mariner, on conviction before one justice by the oath of one witness, to be levied by distress; for want of distress, to be committed till paid. *s.* 1, 2.

8. And if the mariner *deserts* after he hath signed the agreement, he shall forfeit the wages due to him at the time of deserting; and on application from the master, owner, or commander of the ship, such justice may cause him to be apprehended, and if he shall refuse to proceed on the voyage, without sufficient reason to the satisfaction of the justice, the said justice shall commit him to the house of correction, there to be kept to hard labour, not exceeding 30 days, nor less than 14 days. *s.* 3, 4.

9. And if any seaman absent himself from his ship without leave, he shall forfeit for every day's absence two days pay to *Greenwich* hospital, to be deducted by the master out of his wages; the same to be entered in a book, and signed by the master and two officers of the ship; and the same to be paid over to the officer who collects the 6*d.* a month deducted out of seaman's wages for the said hospital. *s.* 5, 9.

10. And if any seaman not entering into the king's service, shall leave his ship before he hath a discharge in writing, he shall forfeit one month's pay, in like manner. *s.* 6.

11. And the master shall pay the seaman's wages, if demanded, in 30 days after the ship is entered at the custom house, or at the time of discharge, which shall first happen, deducting out of such wages the aforesaid forfeitures; on pain of 20*s.* to such seaman, to be recovered, in like manner as his wages. *s.* 7.

This act is continued until the first day of May, 1767, and from thence to the end of the then next session of parliament, by st. 1 G. 3. c. 17. s. 11.

Although

Although it is not unusual for justices to grant general warrants, to search all suspected places for stolen goods, and there is a precedent in *Dalton* requiring the constable to search *all such suspected places as he and the party complaining shall think convenient*; yet such practice is generally condemned by the best authorities.

Thus lord *Hale*, in his pleas of the crown, says, a general warrant to search for felons or stolen goods, is not good. *H. Pl.* 93.

Mr. *Hawkins* says, I do not find any good authority, that a justice can justify sending a general warrant, to search all suspected houses in general for stolen goods: because such warrant seems to be illegal in the very face of it; for it would be extremely hard, to leave it to the discretion of a common officer, to arrest what persons, and search what houses he thinks fit; and if a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill up, surely he cannot grant such a general warrant, which might have the effect of an hundred blank warrants. 2 *Haw.* 82, 84.

Again lord *Hale*, in his history of the pleas of the crown, expresseth himself thus: I do take it, that a general warrant to search in all suspected places, is not good; but only to search in such particular places, where the party assigns before the justice his suspicion, and the probable cause thereof; for these warrants are judicial acts, and must be granted upon examination of the fact. 2 *H. H.* 150.

And therefore he says, he takes it that those general warrants dormant, which are many times made before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretence of such general warrants, give no more power to the officer or party, than what they may do by law without them. 2 *H. H.* 150.

Likewise upon a *bare surmise*, a justice cannot make a warrant to break any man's house, to search for a felon, or for stolen goods; for the justices being created by act of parliament, have no such authority granted to them by any act of parliament; and it would be full of inconvenience, that it should be in the power of any justice of the peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree soever, either in the day or night, upon such surmises. 4 *Inst.* 177.

But in case of a complaint, and oath made, of goods stolen, and that the party suspects the goods are in such a house, and shews the cause of his suspicion; the justice may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him, or some other justice, to give an account how he came by them, and further to abide such order as to law shall appertain. 2. *H. H.* 113, 150.

Search Warrant.

But in that case, lord *Hale* says, it is convenient that such warrant do require the search to be made in the day time; and though I will not affirm (says he) that they are unlawful without such restriction, yet they are very inconvenient without it; for many times under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbances. 2 *H. H.* 150.

But in case not of probable suspicion only, but of positive proof, it is right to execute the warrant in the night time, lest the offenders and goods also be gone before morning. *Barl. Search War.*

Furthermore, such warrant ought to be directed to the constable, or other publick officer, and not to any private person; though it is fit the party complaining should be present and assistant, because he knows his goods. 2 *H. H.* 150.

So much for *granting* a search warrant; next touching the *execution* of it.

Whether the stolen goods are in a suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by this warrant. 2 *H. H.* 151.

If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. 2 *H. H.* 151.

If the goods be not in the house, yet it seems the officer is excused, that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there, till search made; but it seems the party that made the suggestion is punishable in such case; for as to him the breaking of the door is in *eventu* lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. 2 *H. H.* 151.

On the *return* of the warrant executed, the justice hath these things to do;

As touching the *goods* brought before him, if it appear they were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed, by indicting and convicting the offender, to have restitution. 2. *H. H.* 151.

As touching the *party* that had the custody of the goods; if they were not stolen, then he is to be discharged; if stolen, but not by him, but by another that sold or delivered them to him, if it appear that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appear he was knowing they were stolen, he must be committed or bound over to answer the felony. 2 *H. H.* 152.

Search Warrant

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Form of a search warrant.

Dublin. { To the constable of —

WHEREAS it appears to me J. P. esquire, one of the justices of our lord the king, assigned to keep the peace in the said county, by the information on oath of A. I. of — in the county aforesaid, yeoman, that the following goods, to wit, — have within two days last past, by some person or persons unknown, been feloniously taken, stolen, and carried away, out of the house of the said A. I. at — aforesaid, in the county aforesaid; and the said A. I. hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling house of A. O. of — in the said county, yeoman: these are therefore, in the name of our said lord the king, to authorize and require you, with necessary and proper assistants, to enter in the day time into the said dwelling house of the said A. O. at — aforesaid, in the county aforesaid, and there diligently to search for the said goods; and if the same or any part thereof, shall be found upon such search, that you bring the goods so found, and also the body of the said A. O. before me, or some other of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, to be disposed of and dealt withal according to law. Given under my hand and seal at — in the said county, the — day of — in the — year of the reign of —.

Servants.

- I. Rating wages.
- II. Payment of wages.
- III. Complaints against servants.
- IV. Servants stealing the masters goods.
- V. Assaulting the master or fellow servant.
- VI. Firing houses.
- VII. Unlawful combinations.
- VIII. Leaving work unfinished.
- IX. Discharging servants.
- X. Hiring without a discharge.
- XI. Misbehaviour of Nurses.

General observations.

1. **I**F a person retain a servant generally, without expressing any time, the law shall construe it to be for one year, for that retainer is according to law. 2. *Inst.* 42.

2. And

2. And if a woman who is a servant shall marry, yet she must serve out her time, and her husband cannot take her out of her master's service. *Dalt. c. 58. Wood. 89.*

3. If a married man and his wife do bind themselves to serve, they shall be compelled to serve according to their covenant or agreement. *Dalt. c. 58.*

4. If a servant be within age, his agreement with his master to his disadvantage shall not prejudice him. *Dalt. c. 58.*

5. If a servant retained for a year, happen within the time of his service to fall sick, or to be hurt or disabled by the act of God, or in doing his master's business; yet the master must not therefore put such servant away, nor abate any part of his wages for such time. *Dalt. c. 58.*

6. The master is allowed by law, with moderation to chastise his servant. *Dalt. c. 58.*

7. And where a master in correcting his servant, happens to occasion his death, it shall be deemed homicide by misadventure; yet if in his correction he be so barbarous, as to exceed all bounds of moderation, and thereby occasion the servant's death, it is manslaughter at the least; and if he make use of an instrument improper for correction, and apparently endangering the servant's life, as an iron bar, or sword, or kick him to the ground, and then stamp on his belly and kill him, it is murder. *1 Haw. 73, 74.*

8. And if the servant shall depart out of his master's service, and the master happen after to lay hold of him, yet the master in this case may not beat or forcibly compel his said servant against his will to return or tarry with him, or do his service; but either he must complain to the justices, for his servant's departure, or he may have an action of covenant against his servant. *Dalt. c. 121.*

9. According to some opinions, a master shall not forfeit a recognizance of the peace, for beating another in defence of his servant, nor the servant for beating another in defence of his master. *1 Haw. 131.*

But in the case of *Leeward and Basilee, M. 7. W.* It was held by the court, that a servant may justify an assault in defence of his master, but not a master in defence of his servant, because he might have an action for the loss of his service. *1 Salk. 407.*

10. The master is indictable for a nuisance done by his servant; as for throwing dirt in the highways. *L. Raym. 264.*

But nevertheless it seemeth, that the servant also is indictable; for Mr. *Hawkins* says, that a servant is not excused the commission of any crime, by the command or coercion of his master. *1 Haw. 3.*

11. If goods are delivered to the servant of a carrier, and the goods are lost, an action lies against the master. *Wood 95.*

12. A servant with a cart, ran against another cart, wherein was a pipe of sack, and overturned the cart, and spoiled the sack; an action lies against the master. *2 Salk. 441.*

13. *M. 10. W. Jones and Hart.* A pawn broker's servant took a pawn; the pawner came and tendered the money to the servant; he said he had lost the goods; upon this the pawner brought an action against the master; and it was held well. *2 Salk. 441.*

Servants.

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14. *H. 8 G. Mead and Hammond.* The plaintiff, according to the common course of dealing, delivered to the defendant's servant an ingot of gold to assay; and it not being returned, he brought an action against the master. And *Pratt Ch. J.* directed the jury, that the delivery to the servant was sufficient to maintain the action against the master, on proving a subsequent demand and refusal; so the plaintiff had a verdict. *Str.* 505.

I. Rating wages.

1. By the act, 33 *H. 8. sess. 1. c. 9.* The justices of peace in every county yearly in their sessions to be holden within one month after *Easter*, and one month after the feast of *Saint Michael*, shall make proclamations having respect to such prices as victuals, cloth, and other necessities then shall be at, how much every mason, carpenter, slater, and every other artificer and labourer, shall take by the day, as well in harvest season as any other time of the year, with meat and drink, and how much without meat and drink, betwixt both the said sessions.

2. And also at the sessions to be holden after *Easter*, how much every servant at husbandry shall take by the year following, with meat and drink, and every of them shall obey such proclamations as a thing established by act of parliament for a law in that behalf, upon pain of forfeiture; every one of the said artificers, labourers, and servants that shall take any thing contrary to the said proclamations, the thing so taken, and imprisonment of their bodies by the discretion of the said justices.

3. And the justices of peace at any sessions shall determine the same offences, and the half of the said forfeiture to be to the king, and half to them that shall give information, and every act before this time made concerning the limitation of wages for servants, artificers, and labourers, shall be in that point only void.

This act is revived and made perpetual by the act, 11 Eliz. sess. 1. c. 5.

II. Payment of wages.

1. By the act, 2 *G. 1. c. 17. Sect. 1* For the more easy recovery of wages which shall become due to any day labourer, artificer, or servant whose demands shall not exceed three pounds, any justice of the peace of the county where such master or mistress dwells not living more than five miles from the dwelling place of such master or mistress, and if no justice of the peace live within the space of five miles the next neighbouring justice of the peace, and every chief magistrate of any city or town corporate wherein such master and mistress lives, is required upon the complaint of any such labourer, artificer, or servant, upon oath that he or she cannot receive his or her wages due, to summon such master, mistress, or person employing such artificer in writing, not being a peer or peers of this kingdom, to appear before him, in which summons the sum demanded shall be expressed, and the place and time for such persons appearance, for issuing of which summons the justice or chief magistrate or their clerk may take six pence and no more.

And

Servants.

And in case the said master, or mistress, or other persons, neglect to appear according to such summons, the said justice or chief magistrate upon proof on oath that the said summons was delivered to the said master or mistress, or other person, or their son, daughter, or menial servant, of the age of sixteen years or upwards, at such master, mistresses, or other persons usual place of abode, is authorized to proceed to the determining of the said demand as well by examining such witnesses as shall appear before him upon oath as by all other legal ways, and if such justice or chief magistrate shall see it necessary by examination of the parties complaining or complained against on their respective oaths, and to determine what shall be paid by the said master, or mistress, or other person, to such servant, artificer, or day labourer.

And if such master, or mistress, or other person shall not pay what the justice or chief magistrate shall adjudge to be due, within such time as the said justice or chief magistrate shall direct, not exceeding ten days, the said justice or chief magistrate is required by warrant under his hand and seal, at the instance of such labourer, artificer, or servant, directed to any constable of the said county to levy so much as shall be adjudged due, together with six pence for the summons, and six pence for the said warrant, to be paid to the said justice or chief magistrate, or their clerk, and twelve pence to the constable for executing the said warrant, by distress and sale of the goods of such persons so refusing to pay the same, according to the determination of the said justice or chief magistrate.

2. No servant, artificer, or day-labourer, shall have any remedy by this act, unless such servant, artificer, or day-labourer, exhibit their complaint and prosecute the same with effect within three calendar months after such servants are dismissed from, or leave their service, or after such artificer, or day labourer have done their work, or for any master, or mistress, or other person or persons who do not exhibit their complaint, within three months after their cause of complaint did arise against such servants or other persons. *f. 11.*

3. If upon examination of any complaint made pursuant to this act, it appears to such justice or chief magistrate that the complaint is frivolous and vexatious, it shall be lawful for the said justice or chief magistrate, to award any sum not exceeding two shillings and six pence for costs, and to be levied by warrant of such justice or chief magistrate, of the goods of the person making such frivolous complaint, or to put such person in the public stocks for any time not exceeding two hours, in case he shall refuse to pay the sum awarded to the person without cause complained of. *f. 18.*

4. All determinations made by any justice of the peace or chief magistrate, pursuant to this act, shall be conclusive between the parties. *f. 19.*

5. And by the 25 G. 2. c. 8. *f. 1* All complaints and disputes which shall happen between masters or mistresses and servants, or which shall happen between master or mistresses, and artificers, handicraftsmen, miners, colliers, keel-men, pit-men, glass-men, porters, and other labourers employed for any certain time, or in any other manner, shall be determined by any two justices of the peace of the county or place where such master or mistress shall inhabit, altho' no rate or assessment of wages has been made

made that year by the justices of the peace of the county or liberty, or by the mayor, bailiffs, or other head officer where such complaints shall be made, or where such differences shall arise.

Which justices are impowered to examine upon oath any such servant, or any other witnesses touching such complaint, and to summon such master or mistress to appear at a reasonable time, not less than forty eight hours to be prefixed in such summons, and after hearing the parties touching such matter of complaint, to make such order for payment of so much wages to such servant, &c. or other labourer as to such justices shall seem reasonable, provided that the sum in question do not exceed five pounds with regard to any servant, nor three pounds with regard to any artificer, &c.

And in case of non-payment of any sums so ordered by the space of one and twenty days after such determination, such justices shall issue their warrant to levy the same by distress and sale of the goods of such master or mistress, or person employing such artificer, &c. rendering the overplus to the owners after payment of the charges of such distress and sale.

6. If any persons shall think themselves aggrieved by such determination, order, or warrant of such justices, they may appeal to the next quarter sessions to be held for the county or place where such determination or order shall be made; which general quarter-sessions is impowered to hear and finally determine the same, and to award such costs to any of the respective persons, appellant or respondent, as the said sessions shall adjudge reasonable, not exceeding five pounds, the same to be levied by distress and sale of the goods of the party. *f. 5.*

7. In determining the matters in difference as aforesaid, where there are mutual demands betwixt the parties not exceeding five pounds, the demand or debt of the one may be set against the demand or debt of the other. *f. 6.*

And no writ of *certiorari* or other process shall issue, to remove any proceedings had in pursuance of this act in any of his Majesty's courts of record at *Dublin*.

This act, with the several amendments thereto made by ft. 29 G. 2. c. 8. f. 13. are by ft. 1 G. 3. c. 17. f. 32. continued for four years, and to the end of the then next session.

8. Also by the 29 G. 2. c. 8. *f. 13.* The several complaints, differences, and disputes which by an act, 25 G. 2. c. 8. *for the better adjusting, and more easy recovery of the wages of certain servants, &c.* are directed to be heard and determined by two or more such justices of the peace, as in the said act are described, shall and may be heard, and determined by one such justice; which one justice is impowered to make such orders, and to do all such other acts as two or more such justices are impowered by the said act to make or do, with like liberty of appeal from the determination, order, or warrant of such one justice, as by the said act is provided, from the determination of two or more such justices.

The preceding clause of ft. 29 G. 2. c. 8. is continued, by ft. 1 G. 3. c. 17. for four years, and to the end of the then next session.

III. Complaints against servants.

1. By the act, 2 G. 1. c. 17. Forasmuch as several servants are drunkards, idle, or disorderly in their services, or waste and purloin their masters goods or lend the same without their masters or mistresses consent or knowledge, or depart their service without his or her consent within the time for which they had obliged themselves to serve; upon the complaint of any master or mistress upon oath, of any such offence of his or her servant, any justice or chief magistrate where the master or mistress inhabits, is required to issue a warrant for bringing such servants before him, and upon examination and due proof upon oath made of such offences, it shall be lawful for the said justice or chief magistrate, to put such servants in the stocks in some market town on the market day, or in the parish stocks for any time not exceeding six hours, or send them to the house of correction of the county where such offence shall be committed, to be kept at hard labour for any time not exceeding ten days. *§. 2.*

And in case the said master or mistress shall after the said time of punishment is expired, desire the said servant to return to their service for the remainder of the time that by agreement such servant ought to serve, the said justice of the peace or chief magistrate shall order the said servant so to do, and in case the said servant shall refuse so to do; the said justice or chief magistrate is again to commit such servant to the house of correction, to be kept to hard labour and corporally punished during the time he or she ought to serve according to their agreement, or until the next general quarter-sessions of the peace where the justices in open sessions may examine the matter and discharge the said servant or continue him or her as to them shall seem meet.

2. And by the 25 G. 2. c. 8. And it shall be lawful for such justices upon application or complaint made upon oath by any master, mistress, or employer, against any such servant, artificer, &c. or other labourer touching any misdemeanor, miscarriage, or ill behaviour in his or her service or employment, to determine the same and to punish the offender by commitment to the house of correction, there to be corrected and held to hard labour for a reasonable time, not exceeding one calendar month, or by abating some part of his or her wages, or by discharging such servant, artificer, &c. or other labourer from their service or employment.

And in like manner it shall be lawful for such justices, upon any complaint or application upon oath by any such servant, artificer, &c. or other labourer against any such master, mistress, or employer, touching any misuse, refusal of necessary provision, cruelty, or other ill-treatment of such servant, artificer, &c. or other labourer, to summon such master, mistress, or employer to appear before such justices at a reasonable time to be prefixed in such summons, and such justices shall examine into the matter of such complaint, whether such master, mistress, or employer shall appear or not, proof being made upon oath of his or her being duly summoned, and upon proof thereof made upon oath to their satisfaction, to discharge such servant, artificer, &c. or other labourer from his service and employment,

ment, which discharge shall be given under the hands and seals of such justices *gratis*. *f. 2.*

3. If any persons shall think themselves aggrieved by such determination, order, or warrant of such justices, save and except any order of commitment, they may appeal to the next quarter sessions, to be held for the county or place where such determination or order shall be made; which general quarter sessions is impowered to hear and finally determine the same, and to award such costs to any of the respective persons appellant or respondent, as the said sessions shall adjudge reasonable, not exceeding five pounds, the same to be levied by distress and sale, in manner before-mentioned. *f. 5.*

4. And no writ of *certiorari*, or other process, shall issue to remove any proceedings had in pursuance of this act, in any of his majesty's courts of record at *Dublin*.

This act, with the several amendments thereto made by st. 29 G. 2. c. 8. are by st. 1 G. 3. c. 17. sect. 32. continued for four years, and to the end of the then next session.

5. Also by the 29 G. 2. c. 8. The several complaints, differences, and disputes, which by an act 25 Geo. 2. cap. 8. for the better adjusting, and more easy recovery of the wages of certain servants, &c. are directed to be heard and determined by two or more such justices of the peace, as in the said act are described, shall and may be heard and determined by one such justice; which one justice is impowered to make such orders, and to do all such other acts, as two or more such justices are impowered by the said act, to make or do, with like liberty of appeal from the determination, order, or warrant of such one justice, as by the said act is provided, from the determination of two or more such justices. *f. 13.*

The preceding clause is continued by st. 1 G. 3. c. 17. for four years, and to the end of the then next session.

IV. Servant stealing his master's goods.

1. By the act 33 H. 8. ff. 1. c. 5. If any servant to whom any goods shall by his master or mistress be delivered to be kept, shall go away therewith, to the intent to steal the same; or, being in his master or mistress's service, without his or her assent, shall imbezzil, or otherwise convert the same to his own use, with like purpose to steal it, if the same be of the value of 40s. or above, he shall be guilty of felony; but this not to extend to any apprentice, or any person within the age of 18 years.

By his master or mistress] If the master's wife deliver goods of the master to the servant to keep, and he goes away with them, it seems this is within the statute, for he hath them by delivery of his mistress; and the master's wife is as well his mistress, as if she were sole. 1 H. H. 668.

Be delivered to be kept] This statute was introductive of a new law, when the goods were actually delivered to the servant that goes away with them;

them; for where there is such a delivery, it could not at the common law be a felony. 1 H. H. 667.

But yet a servant may be guilty of felony at common law, if he take the goods of his master feloniously; nay, tho' they be goods under his charge, as a shepherd, butler, and the like; and for this he may be indicted at this day as a felony at common law: and of this felony at common law an apprentice, or servant under the age of 18 years, may be guilty, and indicted thereof at common law. 1 H. H. 667.

And therefore tho' this statute exempt an apprentice or servant under 18, from the pain of felony enacted *de novo* by this statute, namely, where goods are actually delivered to him, yet it leaves him in the same condition as to any felony at common law, as if he were not excepted; and therefore if a butler or shepherd, under the age of 18 years, or if an apprentice take away his master's goods feloniously, without an actual delivery, tho' they are under the value of 40s. he is indictable of felony at common law. 1 H. H. 667, 668.

If a man delivers to his servant the key of his chamber door, and the servant taketh away his master's goods in the chamber (above the value of 12d.) this is felony at the common law, for the goods were *not delivered*. Dalt. c. 155.

If a man appoints his servant to take and carry corn to market, and to take his horse to carry the same upon, and the servant goeth away with the corn or horse; this is felony in the servant, if the goods he so goeth away with, be all to the value of 40s. Dalt. c. 155.

But if the servant wastefully consumeth the goods, and returneth again to his master, this is no felony. Dalt. c. 155.

If the master deliver an obligation to his servant, to receive the money thereby due, and the servant receive the money, and goeth away with the same, with intent to steal it; this is no offence within this statute, because he had not the money of the delivery of his master. 3 Inst. 105.

So if the master deliver to his servant wares or merchandizes to sell, and he selleth the same, and goeth away with the money as before, this is no offence within this statute for the cause aforesaid. 3 Inst. 105.

So if the servant receiveth above 40s. of his master's rents, and run away therewith, it is no felony; for the statute is, where the master delivereth it to keep. Dalt. c. 155.

But it is held, that if the master deliver to the servant 20l. in silver, to change it into gold at the goldsmith's, or leather to make shoes, and he run away with the gold or shoes, it is felony. 1 H. H. 668.

Shall be guilty of felony] But not without benefit of clergy. But by the 12 An. st. 1. c. 7. Every person who shall steal goods to the value of 40s. out of any dwelling house, altho' it be not broken open, shall be guilty of felony, without benefit of clergy: But this not to extend to apprentices under 15 years of age.

And in *Josbua Cornwall's* case, M. 4 G. 2. it was adjudged, that a servant may be guilty of burglary with respect to his master's goods, altho' he did not break and enter, nor take, nor carry the goods away. Which was thus: The servant in the night opened the street door, and let in the thief, and

and shewed him the side board, from whence he took the plate; then the servant opened the door, and let him out, but did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the servant, he not going out with the other; wherefore it was ordered to be found specially. And afterwards at a meeting of all the judges at *Serjants-Inn*, they were all of opinion that it was burglary in both. And upon report of this opinion, the next sessions, the defendant was executed. *Str.* 881.

2. And by the 2 *Geo.* 1. *cap.* 17. *sect.* 23. Whereas by a statute 33 *Hen.* 8. *sess.* 1. *cap.* 5. it is made felony for servants to go away with the caskets, jewels, money, goods, or chattels delivered to their keeping by their master or mistress, with intent to steal the same, and defraud their master or mistress thereof, contrary to the trust and confidence in them reposed; or being in service without assent or commandment of his master or mistress, shall imbezzil or convert the same to their use, with purpose to steal the same, being of the value of forty shillings, or above; which law has proved less effectual, because the offenders are intitled to the benefit of clergy. If any person be found guilty of any of the offences in the said statute, or shall stand mute, or challenge peremptorily above twenty, they shall suffer death as in cases of felony, without benefit of clergy.

V. Assaulting the master or fellow-servant.

By the act 5 *Geo.* 2. *cap.* 4. *sect.* 13. If any undertaker or journeyman shall strike or assault any other journeyman for working for their employer; or shall be any way aiding or assisting therein, or if any undertaker or journeyman shall assault his master or employer; for employing whatsoever persons he shall judge proper in his work and service, every person so offending, being thereof, upon complaint of the parties aggrieved, lawfully convicted, upon the oath of one credible witness, before any two justices of the peace, for the county or place where such offence shall be committed, within three months after the offence committed, shall, for every such offence, forfeit forty shillings; one half thereof to the persons aggrieved, and the other half to the poor of the parish where such offence shall be committed; and for default of payment thereof, such offenders shall be committed to the common gaol for any term not exceeding three months.

VI. Firing houses.

By the act 2 *Geo.* 1. *cap.* 5. *sect.* 4. If any servant, through negligence, shall fire, or occasion the burning of any dwelling house or out house, such servants, being thereof convicted by the oath of one credible witness, made before two justices of the peace, shall forfeit fifty pounds unto the churchwardens of such parish, where such fire shall happen, to be distributed by the grand jury at the next quarter sessions, where such fire shall happen, amongst the sufferers by such fire, in such proportion, as to the grand jury shall seem just; and in case of refusal to pay the same immediately, after such conviction, the same being lawfully demanded by the said churchwardens, such servants

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servants shall, by warrant under the hand of two justices of the peace, be committed to some work-house or the house of correction, as the said justices shall think fit, for eighteen months, there to be kept to hard labour.

VII. Unlawful combinations.

1. By the act 17 Geo. 2. cap. 8. sect 4. All meetings and assemblies, where three or more persons, not incorporated by charter, assemble or meet together, and make any by-law, or order, or give any direction, any way relating to journeymen or apprentices or servants, or for the collection of money for the support of journeymen who do not work at their several trades, or of apprentices, or of servants who are out of service, or under pretence of providing for the wives and children of such journeymen, apprentices, or servants, or for the use of any members of such societies upon any pretence, shall be deemed as unlawful assemblies.

And the houses where such persons, to the number of three or more, usually meet, shall be adjudged common nuisances; and the master or mistress of such house, if it be made appear that he or she knowingly permitted such assemblies, shall be prosecuted by presentment or indictment for such offence, and being thereof convicted, shall be punished as those who keep common bawdy-houses are punishable.

And all persons, as well journeymen, apprentices, and servants, who receive wages, as others not incorporated by charter, who enter into any contract, covenant, or articles, any way relating to journeymen, apprentices, or servants; or who shall collect or pay any money for the support of the persons meeting in such clubs or societies, being convicted of such offence before two justices in the manner by the act 3 Geo. 2. cap. 14. directed, and within the time by the said act limited, shall be punished in such manner, as by the said act is directed.

2. It shall be lawful for such justices, and they are required, upon any information given them against persons so offending, to issue summonses to any persons, to appear before them as witnesses on such prosecution; and in case persons so summoned shall neglect to appear, being duly served with such summons, such persons shall forfeit, for such neglect, forty shillings to the informer, to be levied by distress and sale of the offenders goods, by warrant of the said justices; and in case no sufficient distress can be found, such justices are required, by warrants, to send the said offenders to the common gaol for one month, unless such offenders shall sooner submit to be examined. *f. 5.*

3. Provided that nothing said by any person who shall be examined as a witness on any such indictment, or before such justices, shall be given in evidence against such persons who shall be so examined, on any information or indictment he may be charged with, or before any two justices, on this or the former act. *f. 6.*

VIII. Leaving work unfinished.

1. By the act 3 G. 2. c. 14. If any person actually retained or employed as an artificer, workman, servant, or labourer, in any trades or manufactures, shall

shall depart from his service before the end of the time for which he shall be hired or retained, or shall quit his work for the space of three days, or return his work before the same shall be compleatly finished, without the consent of the persons by whom he shall be so employed or retained, unless it be for some sufficient cause, to be allowed by two justices of the peace, in their respective jurisdictions, every person so offending, being thereof lawfully convicted before two justices as aforesaid, shall forfeit five pounds, one half thereof to the informer, and the other half to the poor of the parish; which five pounds the said justices are required to levy by their warrants for distress and sale of the offenders goods; and for want of sufficient distress, to commit the parties offending to the house of correction, there to be kept to hard labour for any time not exceeding three months.

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2. Provided, that if the persons so employing or retaining any such artificer, servant, workman, or labourer, shall not constantly furnish him with proper materials, or shall not pay and discharge all such wages and hire as the same shall become due, according to agreement, such want of materials or non-payment of wages, being first proved before two justices, in every such case such artificer, &c. shall not be liable to the penalties before mentioned, for departing from his service, or quitting or returning his work as aforesaid. §. 4.

3. It shall be lawful for the persons so employing any such artificer, &c. to employ any other persons to finish and compleat such work as shall be so left by any such artificer, &c. and the person who shall be employed to finish such work, though not free of any corporation, shall not be liable to any fines and penalties that may be imposed by any court or corporation for his finishing the said work.

And if any dispute shall arise between any master workman, or other person, employing any such artificer, &c. about the goodness of materials, or whether the same be fit or a sufficient quantity given for the work, for which they were intended, upon application made by either of the parties to one justice, such justice is required to give directions to the master and wardens of the corporation or trade professed by either of the parties, and in such places where no corporation is subsisting, then to any other experienced person to examine into the premises; and the decision so made therein, by the said master and wardens or other experienced person, is to be definitive. §. 5.

IX. Discharging servants.

1. By the act 2 G. 1. c. 17. On the discharge or putting away any servant from his or her service, or upon such servants regularly leaving his or her service, the master or mistress of such servant shall give a certificate in writing under his or her hand, that such person who is therein named was his or her servant, and that he or she is discharged from the said service, and shall in the said discharge, certify, if desired, or such master or mistress thinks fit, the behaviour of such servant. §. 4.

2. No master or mistress shall hire any servant without a discharge as aforesaid, under the hand of the master or mistress, with whom the said servant last

last dwelt; and in case any person shall refuse to give his or her servant a discharge and certificate of their behaviour as aforesaid, such servant may apply to some neighbouring justice of the county or city where such master or mistress inhabits, or to the chief magistrate of any city or corporate town, if such master or mistress live in one, who shall write to the master or mistress of such servant, not being a peer or peers of this realm; and in case such master or mistress shall be a peer or peers of this realm, then to the steward or bailiff of such peer or peers, and require from them respectively the reason why such servant is refused such discharge and certificate of his or her behaviour. *f. 5.*

And in case no answer be given to such letter within five days, or that the justice or chief magistrate shall sooner, by an answer to such letter, find that the cause of the refusal of such discharge or certificate was not sufficient, the said justice or chief magistrate are required to give a certificate thereof, or of such reasons as the master and mistress give for refusing such discharge or certificate, that such person, who is about to hire such servant, may be apprized of such servant's behaviour, and judge thereof, before he or she hires such servant; for which certificate, the said justice or chief magistrate, or their clerks, shall not take any fee; and the said certificate shall be as good as if the same had been given by such master or mistress.

Any servant who shall be convicted of counterfeiting or producing a counterfeited certificate, under the hand of any master or mistress, or justice of the peace, or chief magistrate, or under the hand of the steward or bailiff of any peer or peers, before two justices of the peace, by the oath of one or more witnesses, or by such servant's own confession, shall be committed to the house of correction, and there kept for three months to hard labour, and whipt publicly on some market day, between the hours of eleven and twelve in the morning, through the streets of the town where the house of correction stands.

X. Hiring without a discharge.

1. By the act 2 G. 1. c. 17. No servant shall hire, or offer themselves to be hired, while he or she is actually in service, and before the time for which he or she did contract or hire him or herself be expired, without licence from his or her master or mistress first obtained, unless such servants do first give one months notice thereof to his or her master or mistress; and in case any servant shall do the contrary, on complaint and due proof, upon oath being made thereof, before any justice or chief magistrate, where such servant resides, every such servant shall be committed to the house of correction, for any time not exceeding ten days, there to be kept at hard labour during that time, or put in the stocks in some market town, on the market day, for any time not exceeding six hours. *f. 3.*

2. No servant not having such discharge or certificate, shall be intitled to recover any wages by virtue of this act, from such master or mistress, to whom he or she shall hire him or herself, without producing such discharge or certificate before such justice or chief magistrate, or proving by a sufficient witness on oath, that such discharge or certificate was given to such servant. *f. 6.*

3. And

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3. And if any person shall knowingly take into service any person who has been in any former service, without such discharge or certificate, such person, being thereof convicted at the general quarter sessions of the peace, held for the county or place where such offence shall be committed, shall forfeit five pounds, to be levied by distress and sale of the offenders goods, by warrant of such general quarter sessions, rendering to the party the overplus; one moiety of such forfeiture to be to the use of the poor of the parish where such offence is committed, and the other moiety to the informer, who shall discover and make out the same. *f. 7.*

XI. Misbehaviour of nurses.

1. By the act 2 G. 1. c. 17. No woman shall hire herself to be a nurse, or take upon her the nursing of any child, knowing herself to be with child at the time she taketh the child to nurse; neither shall any woman continue to nurse any child after she knoweth herself to be with child, without giving notice thereof to the parents of the child. *f. 8.*

And no woman that hath any foul or infectious disease, which may be communicated to the child, shall hire herself to be a nurse, or take upon her the nursing of any child, or shall continue to nurse any child, after she shall discover herself to have any foul or infectious disease.

And if any woman offend therein, on complaint made to any justice of the peace, or chief magistrate of any city or town corporate, the said justice or chief magistrate are required to appoint two or more physicians, chirurgeons, or midwives, as the case shall require, to examine the matter complained of, and to make report upon oath.

And if they do on their oaths declare, that in their judgment the woman complained of hath offended in any of the particulars aforesaid, every such nurse so offending, shall, by the judgment of such justice of the peace, forfeit such wages as shall be then due to her, and all such profits or sums of money, as she shall have received on account of such nursing, to the person informing against her for such offence, to be recovered and levied in such manner, as servants wages are herein before directed to be recovered, and also shall suffer such corporal punishment, as by this act is appointed to be inflicted on servants counterfeiting or producing forged or counterfeited certificates.

2. Provided, that no nurse who is with child, shall be whipped for offending against this law, till two months after her delivery. *f. 9.*

XII. How far the master is answerable for the servant.

1. The master is indictable for a nuisance done by his servant; as for throwing dirt in the highways. *L. Raym. 264.*

But nevertheless it seemeth, that the servant also is indictable; as Mr. *Hawkins* says, that a servant is not excused the commission of any crime, by the command or coercion of his master. *1 Haw. 3.*

2. If goods are delivered to the servant of a carrier, and the goods are lost, an action lies against the master. *Wood b. 1. c. 6.*

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3. A servant with a cart, ran against another cart, wherein was a pipe of sack, and overturned the cart and spoiled the sack, an action lies against the master. 2 Salk. 441.

4. *M. 10 W. Jones and Hart.* A pawn-broker's servant took a pawn; the pawner came and tendred the money to the servant; he said he had lost the goods; upon this the pawner brought an action against the master; and it was held well. 2 Salk. 441.

5. *H. 8 G. Mead and Hammond.* The plaintiff, according to the common course of dealing, delivered to the defendant's servant an ingot of gold to assay; and it not being returned, he brought an action against the master. And *Pratt Ch. J.* directed the jury, that the delivery to the servant was sufficient to maintain the action against the master, on proving a subsequent demand and refusal; so the plaintiff had a verdict. *Str.* 505.

6. *M. 8 G. Cary and Webster.* The defendant was a clerk of the South-sea company, and took in payments. The plaintiff paid him 600*l.* and he paid it over to the company. And by *Pratt Ch. J.* No action in this case lies against the servant. If he had not paid it over, the plaintiff would have had his option, either to charge him or the company; as in the common case of payment to a goldsmith's servant, who doth not carry it to the account of his master, the party hath an election to go against either: he may charge the servant, because till the money is paid over, the servant receives it to his use; or he may pass by the servant, and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master. *Str.* 480.

A. Summons of the master for wages, on complaint of the servant.

Dublin. { To the constable of—in the said county.

WHEREAS information and complaint hath been made unto me—
one of his majesty's justices of the peace in and for the said county, upon the oath of A. S. of—in the said county, husbandman, that he the said A. S. was duly hired by A. M. of—in the said county, husbandman, to be a servant in husbandry to and with him the said A. M. for the space of —[or, labourer; or, artificer; or as the case shall be] for the wages of —: And accordingly that he the said A. S. hath duly performed the said service; yet nevertheless that he the said A. M. hath refused, and doth refuse, to pay unto him the said A. S. the wages justly due to him for his said service: These are therefore to command you forthwith to summon the said A. M. to appear before me at—in the said county, on—the—day of this present month of—at the hour of—in the afternoon of the same day, to shew cause why the said wages should not be paid. And be you then there to certify what you shall have done in the premisses. Given under my hand and seal, the—day of—in the—year of the reign of—.

B. Order

B. Order for payment of the same.

— **W**HEREAS information and complaint hath been made unto me — one of his majesty's justices of the peace in and for the said county, upon the oath of A. S. of — in the said county, husbandman, that he the said A. S. was duly hired by A. M. of — in the said county, husbandman, to be a servant in husbandry, to and with him the said A. M. for the space of — [or, artificer, glassman, pitman, labourer, or otherwise as the case shall be] and that he the said A. S. hath duly performed the said service; yet nevertheless, that he the said A. M. did refuse to pay to him the said A. S. the wages justly due unto him for such service as aforesaid; And whereas the said A. M. having appeared before me, in pursuance of my summons for that purpose, hath not proved to me, that the said wages have been duly paid to him the said A. S. as aforesaid, nor hath shewed to me any just cause why the said wages should not be paid, and hath not paid the same: [Or, And whereas it duly appears to me, as well upon the oath of A. C. constable of — aforesaid, as otherwise, that he the said A. C. by virtue of my precept to him directed, did duly summon the said A. M. to appear before me at a certain time and place therein prefixed, to shew cause why the said wages should not be paid; and whereas the said A. M. hath neglected to appear according to the said summons, and hath not shewed any cause as aforesaid] I therefore having duly examined into the truth and matter of the said complaint, and upon due consideration had thereof, do hereby adjudge, determine, and order, that he the said A. M. upon due notice hereof, do pay or cause to be paid to him the said A. S. the sum of — which appears to me to be just and reasonable to be paid by him the said A. M. to him the said A. S. as and for his wages as aforesaid. Given under my hand and seal the — day of — in the — year of the reign of —.

C. Warrant of distress for the same.

— { To the constable of —.

WHEREAS A. S. of — in the said county, husbandman, hath duly complained unto me — one of his majesty's justices of the peace in and for the said county, that A. M. of — in the said county, husbandman, hath refused to pay unto him the said A. S. the wages justly due unto him for service in husbandry truly and faithfully performed by him the said A. S. to him the said A. M. [Or, as the case shall be] And whereas the said A. M. having appeared before me in pursuance of my summons for that purpose, hath not proved to me that the said wages have been paid to him the said A. S. as aforesaid, and hath not shewed any just cause why the same should not be paid [Or, And whereas the said A. M. hath been duly summoned by me to shew cause to me why the said wages should not be paid, but he the said A. M. hath neglected to appear according to the said summons, and hath not shewed any cause as aforesaid] I therefore the said justice, upon due consideration had thereof,

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thereof, on the——day of——now last past, by writing under my hand and seal, did thereupon determine and order, that he the said A. M. should pay to him the said A. S. the sum of——which appeared to me to be just and reasonable to be paid by him the said A. M. to him the said A. S. as and for his wages as aforesaid; And whereas it duly appears to me, that he the said A. M. on the said——day of——now last past, had due notice of my said order, and that due demand of the said sum of——was then made of him the said A. M. by him the said A. S. but that he the said A. M. did not then pay, nor hath yet paid the same, nor any part thereof; These are therefore to command you to make distress of the goods and chattels of him the said A. M. and if within the space of [four] days next after such distress by you made, the said sum of——together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by the sale thereof, that you pay the said sum of——unto him the said A. S. returning the overplus upon demand unto him the said A. M. the reasonable charges of taking, keeping, and selling the said distress, being thereout first deducted. Given under my hand and seal the——day of——in the——year——.

D. Warrant for a servant on complaint of the master for misbehaviour.

—— { To the constable of——.

WHEREAS information and complaint hath been made unto me——one of his majesty's justices of the peace, in and for the said county, upon the oath of A. M. of——in the said county, husbandman, [artificer, labourer, or as the case shall be] that A. S. of——aforesaid in the said county, husbandman, was hired by him the said A. M. to be servant in husbandry to him the said A. M. for the space of——and that he the said A. S. hath in his said service [or, employment] been guilty of divers misdemeanors, miscarriages, and ill behaviour, towards him the said A. M. and particularly [as the case shall be]; These are therefore to command you forthwith to bring the said A. S. before me to answer unto the said complaint, and to be further dealt with according to law. Given under my hand and seal, the——day of——in the——year of the reign of——.

E. Commitment of the servant thereupon to the house of correction.

—— { To the constable of——in the said county, and to the keeper of the house of correction at——in the said county.

WHEREAS information and complaint hath been made——(the same as above, reciting the complaint) And whereas in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint,

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plaint, and upon due consideration had thereof, have adjudged and determined the said complaint to be true: These are therefore to command you the said constable forthwith to convey the said A. S. to the said house of correction at—
aforesaid, and to deliver him to the keeper thereof, together with this warrant: And I do hereby command you the said keeper to receive the said A. S. into your custody in the said house of correction, there to remain, and be corrected, and held to hard labour, for the space of one kalendar month [or for a lesser time] from the date hereof. And for your so doing, this shall be your sufficient warrant. Given under my hand and seal, the—day of—in the—year of the reign of—.

F. Or otherwise he may be punished by abatement of wages, as follows:

THE same as above to—have adjudged and determined the said complaint to be true: I do therefore hereby order, as a punishment for the said offence, that the said A. S. shall abate from his wages to be paid to him by the said A. M. the sum of—and do hereby discharge the said A. M. from the payment of the said sum of—as part of the wages of him the said A. S. Given under my hand and seal, the—day of—in the—year—.

G. Or otherwise he may be discharged, thus:

—have adjudged and determined the said complaint to be true: I do therefore hereby order, as a punishment for the said offence, that the said A. S. be discharged, and do hereby discharge him the said A. S. from his said service [or employment] and the said A. M. from keeping him the said A. S. Given under my hand and seal, the—day of—in the—year—.

H. Summons of the master, on complaint of the servant, for ill usage; on the 20 G. 2. c. 18.

— { To the constable of—.

WHEREAS complaint hath been made unto me—one of his majesty's justices of the peace in and for the said county, upon the oath of A. S. of—in the said county, husbandman, [labourer, &c.] that he the said A. S. was duly hired by A. M. of—aforesaid in the said county, husbandman, to be servant in husbandry to him the said A. M. for the space of— [or, as the case shall be] and that he the said A. S. did accordingly at the time aforesaid enter upon, and afterwards until this present time hath continued, and doth continue, in the said service [or employment]: But that he the said A. M. during the said service hath misused him the said A. S. [refused necessary provision, been guilty of cruelty or other ill treatment, mentioning the particulars] These are therefore to require you in his majesty's name, to summon the

Servants.

the said A. M. by shewing unto him this precept, or leaving a true copy thereof at his usual place of abode, to appear before me on——at the house of——in——in the said county, at the hour of——in the afternoon of the same day, to answer unto the said complaint. And be you then there with this precept, to certify what you shall have done in the execution thereof. Given under my hand and seal, the——day of——in the——year——.

I. Discharge of the servant thereupon.

THE same as before to the end of the complaint,——*And whereas the said A. M. in pursuance of my summons for that purpose hath appeared before me, to answer unto the said complaint, but hath not proved that he is not guilty of the said complaint and charge; but on the contrary it hath been fully and duly proved before me, that he the said A. M. is guilty of the several offences so complained of as aforesaid; [Or, And whereas it appears to me, upon the oath of A. C. constable of——aforesaid, that he the said A. C. by virtue of my precept to him directed, did duly summon him the said A. M. to appear before me at a reasonable time therein prefixed, to answer unto the said complaint, but he the said A. M. hath neglected to appear according to the said summons] I therefore, having examined into the truth and matter of the said complaint, and upon due consideration had thereof, do hereby adjudge the said complaint to be true; and thereupon do order that the said A. S. be discharged, and do hereby discharge the said A. S. from his said service [or, employment]. Given under my hand and seal, the——day of——in the——year of the reign of——.*

Sessions.

Sessions, what.

1. **T**HE sessions of the peace is a court of record, holden before two or more justices, whereof one is of the *quorum*, for execution of the authority given them by the commission of the peace, and certain statutes and acts of parliament. *Dalt. c. 185.*

Difference between general, quarter, and special sessions

2. It seems that the *general* sessions, and *quarter* sessions, are not synonymous; but that the quarter sessions are a species only of the general sessions, and that such sessions only are properly called general quarter sessions, which are holden in the four quarters of the year, in pursuance of the statute of the 2 *H. 5.* and that any other sessions holden at any other time for the general execution of the justices authority, which by the said statute they are authorized to hold oftner than at the times therein specified, if need be, may be properly called *general* sessions, and that those holden on a special occasion for the execution of some particular branch of their authority, may properly be called *special* sessions. *2 Haw. 42.*

At what time the sessions shall be kept.

3. By the 12 *R. 2. c. 10.* The justices shall keep their sessions in every quarter of the year at least, and by three days, if need be; on pain of being punished according to the discretion of the king's council, at the suit of every man that will complain.

And

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And by the 2 *H. 5. §. 1. c. 4.* The particular time in every quarter of the year shall be as follows; to wit, in the first week after the feast of *St. Michael*, in the first week after the *Epiphany*, in the first week after the clause of *Easter*, and in the first week after the translation of *St. Thomas* the martyr; and more often if need be.

The strict, regular exposition of the abovesaid statute of the 2 *H. 5.* is, that if the feast day fall upon the *sunday*, the sessions shall be held in the week following, and not the same week. 2 *H. H. 49.*

Yet it is very plain, that the quarter sessions are variously held in several counties, some at one day, and some at another, yet it hath been ruled, that these are each of them good quarter sessions within the several acts that relate to quarter sessions; for these acts, especially the 2 *H. 5.* is only directive and in the affirmative, and therefore, tho' the sessions are held on another day, according to the general direction of the 12 *R. 2.* yet they are quarter sessions. 2 *H. H. 50.*

4. There is no determination by any statute, of any particular place for the sessions to be kept, so it be within the county. And if a place within the county be incorporated, and have justices of its own, yet the same remains part of the county, and the justices of the county may notwithstanding hold their sessions there, although it may be that they shall not intermeddle with matters arising there, save only such as happen in their sessions, or with relation thereunto. *Dalt. c. 185.*

Where the sessions shall be holden.

5. And from hence it seems to follow, that any two such justices may direct their precept under their teste to the sheriff, for the summons of the sessions, thereby commanding him to return a grand jury before them, or their fellow justices at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present and do their duties at such day and place, and to proclaim in proper places throughout his bailiwick, that such sessions will be holden at such day and place, and to attend there himself to do his duty. 2 *Haw. 41.*

Precept to summon the sessions.

And such precept should bear teste, or be dated, fifteen days before the return, and ought forthwith to be delivered to the sheriff, to the end he may have sufficient time to proclaim the sessions, to summon and return the several juries, and to warn all officers and others that have business there, to attend. *Nelf. 35.*

And it is said that such a precept by any two such justices cannot be superseded by any of their fellows, but only by writ out of chancery. 1 *Haw. 41.*

But the sessions without a previous summons is good, but then no man shall lose any thing for default of his appearance there, because no man had notice of their sitting. *Lamb. 381.* Nor can any one be compelled to appear there. *L. Raym. 1238.*

Mr. *Lambard* puts a case from Mr. *Marrow*, that if two or more justices appoint the sessions to be holden in one town, and so many more appoint a sessions in another town the same day, and holds they may be so held, and that the presentments in both are good; but that appearance at one, is a discharge of service at the other. But it may be well questioned whether they are not both void; for they make two courts of that which ought to be intire and but one: for it doth not appear that the justices are required or

or enabled to hold more than one sessions at a time, and so their authority being equal, and seeing no preference can be made by the priority of time, or nature of the service, they may be taken to be both void. However the justices, by whose forwardness such division happens, or on whom such miscarriage is chargeable, are punishable for the same by information and fine, or putting out of the commission, as the cause shall require. *Dalt. c. 185.*

Persons who
are to appear
there.

6. The persons who ought to appear at these sessions are as follows:

(1) The *justices of the peace*; these without doubt are compellable to appear at the sessions, for without their appearance the sessions cannot be holden. *Dalt. c. 185.*

But a justice ought not to join in an order at sessions wherein himself is concerned, nor ought his name to be in the caption. An order was quashed for that reason; *2 Salk. 607.*

(2) The *custos rotulorum*, who hath custody of the rolls of sessions, ought (by the commission) to be there by himself, or by his deputy, who is the clerk of the peace. *Dalt. c. 185.*

(3) The *sheriff* also, by virtue of the commission, by himself or his deputy; to receive the fines, to return jurors, to execute process, and what else to his office doth appertain. *id.*

(4) All *coroners*. *id.*

(5) The *constables of hundreds* (that is high constables) and all other officers to whom any warrant hath been directed, in order to make return thereof. *id.*

(6) All *bailiffs of hundreds and liberties*, in respect they are bound to give an account of all sessions process. *id.*

(7) The *gaoler*; to bring thither his prisoners, and to receive such as may be committed. *Dalt. c. 185.*

(8) The *keeper of the house of correction*, to give in a kalendar and account of persons in his custody. *id.*

(9) All jurors returned by the sheriff, by virtue of the aforesaid precept. And the jurors not appearing according to their summons, are punishable by loss of issues, which usually make part of the estreats of sessions. *id.*

(10) All persons bound by *recognizance* to answer, or to prosecute and give evidence. *id.*

Freedom of
access to the
sessions.

7. And all persons may freely attend at the sessions for the advancement of publick justice, and for the service of the king. And to this end they are (as it were) invited thither by a certain freedom of access, and by protection from common arrest; a thing that is incident to every court of record, and without which, justice would be greatly hindered. So that if a man come voluntarily to the sessions, either to prefer a bill of indictment, or to give information against another, or to tender a fine upon an indictment touching himself, or do come compelled to make appearance for saving his recognizance, and be arrested by the sheriff upon common and original process, in his coming thither, or during his tarrying there; it seemeth (Mr. *Lambard* says) that (upon examination of the matter under his oath) he shall be discharged thereof by the privilege of this court, even as it is used in the higher courts at *Westminster*. *Lamb. 402.*

But Mr. *Hawkins* puts it more doubtfully, saying, it is questioned whether the sessions, as also all courts of record, may not discharge any person arrested,

arrested, during his journeying to or from such courts, or necessary attendance there, by process from any other court: However it seems to be agreed, that any such court may discharge a person who shall be so arrested in the face of it. 2 *Haw.* 5.

T. 7 G. 2. It seemeth to have been agreed in the argument upon Col. Pitt's case (which was an arrest in his return from parliament) that not only in the high court of parliament, but also in the inferior courts, the parties to the suit, and also the witnesses, are protected in going, continuing, and returning. And this returning hath never been very nicely scanned, so as to require a man to go the direct road, and the protection is not forfeited by the plea of *going out of the way*, because it may be the party went to buy a horse, victuals, or other necessities for his journey. Neither is the law so strict in point of time, as to require a person to set out immediately after the trial is over; and for that was cited the case of *Hatch and Blisset*, T. 13 Ann. she had a trial at *Winchester* assizes, which was over on *Friday* at four in the afternoon: she staid there till after dinner on *Saturday*; and in the evening at seven was arrested going home to *Portsmouth*, which is twenty miles: and the court held, that she ought to be discharged, her protection not being expired, and a little deviation or loitering would not alter it. *Str.* 987.

But where a man is arrested by process out of the courts at *Westminster*, it doth not seem that the justices of the peace (unless the arrest is made in the sessions) have power to discharge him; but on application to the court from whence the process issued, such court probably may discharge him, and punish the person who made the arrest.

8. Where authority is given to two justices to do any act, the sessions may do it, in all cases, except where appeal is directed to the sessions. *L. Raym.* 426.

9. Justices may issue their warrants for apprehending persons charged of crimes within the cognizance of the sessions, and bind them over to appear there, although the offender be not yet indicted. 1 *H. H.* 579.

10. If jurisdiction be given to the sessions, to hear and determine, and doth not say by information, this shall be by indictment, and not upon information. *Dalt. c.* 191.

11. The sessions are not obliged to give any reason of their judgment in the orders they make, no more than any other of the courts of law. 2 *Salk.* 607.

12. By *Holt Ch. J.* The sessions is all as one day, and the justices may alter their judgments, at any time whilst it continues. 2 *Salk.* 606.

13. In the case of *Thornby and Fleetwood*, T. 6 G. (which was upon a writ of error in the king's bench brought against a judgment given in the court of common pleas) the court was equally divided; whereupon it was considered what was further to be done. And after several expedients, which were judged impracticable, the parties at last consented that the judgment should be affirmed, so that the case thereupon might come before the house of lords for a final determination. And *Pratt Ch. J.* delivered the opinion of the court thus: The plaintiffs in error move us for an affirmance: As to that you see the court is divided, and there can be no rule: but in this case, because the party against whom it is to be affirmed, is desirous and willing it should be so, we are all of opinion that upon his consent the judgment

The sessions may do what two justices may.

Justices may bind over for offences cognizable at sessions. Sessions to proceed by indictment.

Need not give their reasons.

Orders may be altered the same sessions. Court equally divided.

ment of the common pleas may be affirmed. But lest this be brought in future ages as a precedent of an affirmance upon a division, we direct the officer to make the rule special in this case, on recital of the difference in opinion amongst the judges, and the consent of the party. *Str.* 383, 4.

T. 8 G. 2. K. and the justices of *Westmorland*. Order of two justices of the borough for removing a poor family; appeal to the sessions of the county, at which the justices were equally divided; so no determination was made, nor the appeal adjourned. A *mandamus* was directed to all the justices of the county in general, to proceed on the appeal. And it was said, that the justices ought in this case to have adjourned the appeal, or continued it over to a subsequent sessions, till by the coming of more justices it might have been determined. *Seff. C. V. 2.* 193.

Or if the court shall be still divided, as so it may happen in small counties or towns corporate where the justices are but few, or where the number is reduced by reason of the rest being interested; in order that the cause may not be hung up for ever, it may be advisable (according to the course prescribed in the case of *Thornby* and *Fleetwood* abovementioned) for the court, by consent of the parties, to affirm or quash, and thereupon state the case specially, to be laid before the judges of assize, or rather before the court of king's bench; for the judges of assize are oftentimes sufficiently employed with the proper business of the circuit, without being importuned with these matters of inferior consequence.

Sessions cannot refer.

14. A judge of *nisi prius* by consent of parties may make a rule to refer a cause; but the sessions cannot do so, though by consent. They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other. *2 Salk.* 477.

How far the sessions hath power over its own members.

15. It seemeth certain, that the sessions hath no authority to amerce any justice for his non-attendance at the sessions, as the judges of assize may for the absence of any such justice at the gaol delivery: for it is a general rule, that *inter pares non est potestas*, it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves. And therefore it seems to have been holden, that if a justice at the sessions, who is not of the *quorum*, shall use such expressions towards another who is of the *quorum*, for which if he were a private person he might be committed or bound to his good behaviour, yet the sessions hath no authority to commit him, or to bind him to his good behaviour: And yet it seems to be agreed, that if a justice give just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security; for the publick peace requires an immediate remedy in all such cases. *2 Haw.* 41, 42.

Whether they may issue a *capias utlagatum*.

16. The sessions may proceed to outlawry in cases of indictments found before them; and that, by the common law; and in cases of popular actions, by the *10 C. 1. §. 4. c. 11.* But they cannot issue a *capias utlagatum*, but must return the record of the outlawry into the king's bench and there process of *capias utlagatum* shall issue. *2 H. H.* 52. *Lamb.* 521.

But by the *12 Co.* 103. They that have power to award process of outlawry, have also a power to award a *capias utlagatum*, as incident to their authority and jurisdiction.

17. Generally,

Sessions.

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17. Generally, the sessions cannot award an attachment for contempt in not complying with their orders ; but the ordinary and proper method is by indictment. *H. 8 G. 2. K. and Bartlett. Seff. C. V. 2. 176.* Whether they may award an attachment.

18. Generally, it is said, that the justices are not punishable for what they do in sessions. *Stam. 173.* Unless there be some manifest act of oppression, or wilful abuse of power. *2 Barnardist. 249, 250.* Justices not punishable for what is done in sessions.

19. The manner of proceeding at the sessions, is as follows : First, the justices being met, the usual course is with three oyes to proclaim the sessions, and then read the commission of the peace. *Dalt. c. 185.* Manner of proceeding in sessions.

20. Then the grand jury are called and sworn, and the charge given to them. *id.* Grand jury sworn.

21. If there be any who are to take the oaths, in order to qualify them for offices, this must be done between the hours of 9 and 12 in the forenoon, and not otherwise. *2 Ann. c. 6. s. 18.* Taking oaths.

22. The king's proclamation against profaneness and immorality is also to be read ; and likewise there are divers acts of parliament required to be read in the sessions. Acts to be read.

23. Then the recognizances may be called, especially such as are to prosecute and give evidence, that so bills may be drawn and prepared. *Dalt. c. 185.* Recognizances to give evidence called.

24. Although it has been used sometimes, to try a man for felony the same sessions in which the indictment is found, yet it seems highly reasonable, if the prisoner desire it, to be deferred, and shew cause probable, to defer it. For that, 1. The sessions are holden oftner than the assizes. 2. The speedy trials seem to be in favour of the prisoner, and *volenti non fit injuria*, 3. If a traverse upon an indictment of nuisance be not triable the same sessions that it is joined, but a man shall have time to provide for it ; much more in matter of life, where usually the party is in prison, and may well be supposed less able to provide for it, and in the nature of it requires greater consideration. *Dalt. c. 185.* Trying for felonies at the same sessions.

And, in another place, it is said, that it is made a doubt, whether a trial can be had of a felon the same sessions he pleads, unless he consents to it. *Dalt. c. 185.*

25. The bills being ready, the parties bound over for that purpose are sworn to give evidence upon the bills ; and the course is, to bid the evidence go with the grand jury, where they consider of the bill, and either find it or not find it, and then return it. *id.* Bills before the grand jury.

26. Whilst the jury is gone out of court, the usual way is, to proceed upon motions and orders touching settlements, bastardy, nuisances, and the like ; and to call persons bound over to the peace or good behaviour, but it may not be best to discharge them till the end of the sessions, because bills may be preferred against them. *id.* Other business whilst the grand jury are gone out ; such as motions.

27. Mr. *Shaw* (*Tit. Sessions*) says, no indictment for a nuisance shall be quashed or discharged, unless two justices do certify to the court upon their own view, either by certificate under their hands, or in person, that the nuisance is removed ; and for this he quotes *3 Cro. 584. Layton's case*. But that case only mentions a certificate in general, and the certificate in that case was not a certificate of two justices, but of several inhabitants adjoining ; and it should seem that the sessions may be well satisfied of such removal of a nuisance, by other evidence, as well as by that of two justices. Certificates of nuisances removed.

Traverses
tried.

28. Then may be called the persons bound by recognizance at the last sessions, to prosecute their traverses at the present sessions. For if a person indicted of a trespass or other misdemeanor, do appear, and shall plead not guilty, and traverse the indictment, he shall enter into recognizance to prosecute his traverse at the next quarter sessions. For in *Bumstead's case*, 11 C. The whole court was of opinion, that justices of the peace may not inquire, try, and determine civil offences, in one and the same day; for the party ought to have a convenient time to provide for the trial. *Cro. Car.* 448.

And on the trial of a traverse, the defendant must appear in the court, at the bar, in his proper person; and then the indictment is read to the jury; and the prosecutor and his witnesses are called to give evidence, and are heard; and if the defendant is found guilty, the court sets a fine upon him adequate to the offence, or other punishment as the law directs. *Crown Cir.* 50, 51.

In case of trespass and assault, the court frequently recommends the defendant to talk with the prosecutor, that is, to make him amends for the injury done him; and if the prosecutor comes and acknowledges a satisfaction received, the court will set a small fine on the defendant, as 3 s. 4 d. or 12 d. *Cro. Cir.* 52.

Sometimes the prosecutor and defendant agree, before the defendant pleads to the indictment; and then the defendant comes into court in his proper person, and pleads guilty to the indictment; and upon proving, by a subscribing witness, a general release executed by the prosecutor, the defendant submits to a small fine, such as the court is pleased to impose. *Cro. Cir.* 52.

There are frequent prosecutions at the sessions for trifling assaults, in which cases it is adviseable for a defendant not to put himself to the expence of trying the indictment; but to give notice to the prosecutor, that he intends to plead guilty, to the indictment; in which case the prosecutor attends the court with his witnesses, and gives evidence of the nature of the offence; and then the court proceeds to fine the defendant for his misbehaviour towards the prosecutor: But before that is done, the court will admit the defendant to call such witnesses as he desires, and will examine them by way of mitigation. *Cro. Cir.* 54.

Trial for petit
larceny and o-
ther felonies.

29. And because the arraignment and trial of prisoners is a great part of the business of the sessions, I will take notice of some parts thereof, and proceedings thereupon:

Arraignment:

Towards the end of the sessions, when it appears what bills are come in against the prisoners, the gaoler being called to set his prisoners to the bar, and the crier being called to make a bar, that is, to dispose of the company, that a way be made open from the court to the prisoners, that the court, jury, and prisoners may see each other, one of the prisoners is called to; *A. B.* hold up thy hand. *Dalt. c.* 185.

Holding up the
hand.

Yet it is not necessary that he hold up his hand at the bar, or be commanded so to do; for this is only a ceremony, for making known the person of the prisoner to the court, and if he answers that he is the same person, it is all one. 2 *Haw.* 308.

Guilty or not
guilty.

Then he is acquainted with the effect of the charge laid against him, Thou *A. B.* standest indicted, by the name of *A. B.* for that thou ——— (and

Sessions.

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(and so recite the indictment). How sayest thou, *A. B.* Art thou guilty of this felony and petit larceny whereof thou standest indicted, or not guilty? *Dalt. c. 185.*

If he make no answer at all, and will not plead, it is best to ask him three or more times, and to tell him the danger of standing mute, and the grievousness of the judgment of the *peine fort & dure*; and yet if he will stand mute, nothing more can be done concerning him till judgment, but to record it. *id.* Mute.

But if it be for petit larceny only, he shall not be put to his *peine fort & dure*, as in case of grand larceny, but he shall have the like judgment as if he had confessed the indictment. *2 Haw. 329.*

If he pleads privilege, it hath been adjudged, that where proceedings are merely at the suit of the king, as upon indictment, or upon information brought by the attorney general, no privilege shall be allowed; but where the proceedings are at the suit of the king and of the party, as in case of a common informer, there the defendant may have his privilege. *1 Lutw. 62.*

If he answer that he is guilty, then the confession is recorded, and no more done till judgment. *Dalt. c. 185.* Confession.

But if he say, not guilty, he is then asked; how wilt thou be tried? *Dalt. c. 185.* Trial by the country.

Which was formerly a very significant question, though it is not so now; because anciently trial by battel, and trial by ordeal was used, as well as by the country, or a jury.

Therefore it is now usually answered, By God and the country. *Dalt. c. 185.*

Mr. *Hawkins* observes, that every person at the time of his arraignment, ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner, as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unless there be some danger of a rescous or escape. *2 Haw. 308.* Humanity towards the prisoner.

And the court ought to exhort him to answer without fear, and to acquaint him that he shall have justice done to him. *2 Inst. 316.*

Next, the prisoner having put himself upon his country, the prosecutors are called on their recognizances, to give evidence. *Dalt. c. 185.* Witnesses call d.

Then the jury are called on their panel, thus, You good men that are returned and impanelled, to try the issue joined between our sovereign lord the king and the prisoner at the bar, answer to your names. *Dalt. c. 185.* Jury called.

Which done, and they appearing a full jury, a proclamation is made; If any can inform the king's attorney, or this court, of any treasons, murders, felonies, or other misdemeanors against *A. B.* the prisoner at the bar, let them come forth, for the prisoner stands upon his deliverance. *Dalt. c. 185.* Proclamation.

Then it is said to the prisoner, You prisoner at the bar, the persons that you shall now hear called, are to pass upon your trial (upon your life and death, if it is a capital offence); if you will challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they be sworn. *Dalt. c. 185.* Challenge.

Then

Jury sworn.

Then call the foreman of the jury, and say unto him, Lay your hand on the book, and look upon the prisoner; You shall well and truly try, and true deliverance make, between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to your evidence: So help you God.

Then call the second, and so swear him in like manner, and so on to 12, and neither more nor less. 2 H. H. 293.

Jury charged.

Then count them 12, and say, You good men that are sworn, you shall understand, that *A. B.* now prisoner at the bar, stands indicted, for that he — (and so recite the indictment): To which indictment he hath pleaded not guilty, and for his trial hath put himself upon God and the country, which country you are; so that your charge is, to inquire whether he be guilty of the felony or petit larceny whereof he stands indicted, or not guilty; If you find him guilty, you shall say so, and inquire what goods and chattels he had at the time of the said felony and petit larceny committed, or at any time since: (Or, if it be for felony above petit larceny, — then, what goods and chattels, lands and tenements he had at the time of the said felony committed, or at any time since:) If you find him not guilty, you shall enquire, whether he did fly for it, and if you find that he fled for it, you shall enquire what goods and chattels he had at the time of such flight. If you find him not guilty, and that he did not fly for it, you shall say so, and no more; and so hear your evidence. 2 H. H. 293, 294. Dalt. c. 185.

Witnesses sworn.

Then call the witnesses, and swear them, one by one, thus; *The evidence that you shall give on the behalf of our sovereign lord the king, against A. B. prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth: So help you God.* Dalt. c. 185.

Witnesses for the prisoner.

When the witnesses for the king have been examined, if the prisoner desires that any witnesses should be examined for him, they must be examined also on oath.

Prisoner not to have counsel.

On trials of this nature, the prisoner shall not have counsel allowed to him, unless a point of law arise, proper to be debated; nor a copy of the indictment. 2 Haw, 400, 402.

But in offences under felony, a defendant may be heard by his counsel. Wood. b. 4. c. 5.

Court to be of counsel with him.

Otherwise, the court is to be of counsel with the prisoner, and ought to advise him for his good, and not take advantages too strictly against him. Dalt. c. 185.

Evidence summed up.

When the prisoner hath done, and hath been heard all that he hath to say in his defence, the evidence is summed up by the court to the jury. And if they cannot agree on their verdict at the bar, a bailiff must be sworn to keep the jury, thus; *You shall swear that you shall keep this jury, without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed: So help you God.* id.

Verdict.

The jury coming back, the prisoner is brought to the bar; then the jury is called; they appearing, say, Set *A. B.* to the bar; Who being there, say, Look upon the prisoner; how say you, is *A. B.* guilty of the felony (or as the case is) whereof he stands indicted, or not guilty? If they say, not guilty, bid him down upon his knees. If they say, guilty; record it, and bid him be taken away. Then say, hearken to the verdict as the court hath recorded it;

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it; You say, *A. B.* is guilty [or, is not guilty] of the felony whereof he stands indicted. *id.*

Then make a proclamation and say, All manner of persons keep silence, whilst judgment is given against the prisoner at the bar, upon pain of imprisonment. Then set the prisoner to the bar, and give the sentence. *id.*

30. Where the sessions is adjourned, the stile of the sessions ought not to run at such a sessions held by adjournment; but the original meeting of the sessions ought to be set forth, and that it was continued from thence to such further time by adjournment. *Str.* 832, 865. Adjournment of the sessions.

But such adjournment ought not to be beyond the time of meeting of the next quarter sessions. As in the case of the *King and Grince, T. 4 G.* An indictment was found before the justices for the county of *Lincoln*, against a constable for refusing to obey an order of the justices; and the defendant was tried, convicted, and had judgment given against him, at a general sessions held the 3d day of *May* (which was after the *Easter* sessions began) by the adjournment of the *Epiphany* sessions: But by the court of king's bench the judgment was reversed; because the justices cannot continue one general sessions to a day subsequent to the time appointed by the 2 *H.* 5. c. 4. for the holding another original sessions. *Vin. Sefs. W.* 7.

31. By the 12 *R.* 2. c. 10. The justices shall take for their wages 4 s. the day for the time of their sessions, and their clerk 2 s. of the fines and amerciaments, rising and coming of the same sessions, by the hands of the sheriffs. And the lords of franchises shall be contributory to the said wages, after the rate of their part of fines and amerciaments. Wages of the justices, and estreats.

But no duke, earl, baron, or baneret, shall take any wages. 14 *R.* 2. c. 11.

And the estreats of the justices shall be doubled, and the one part delivered by them to the sheriff, to levy the money thereof rising, and thereof to pay the justices their wages by the hand of the sheriff, by indenture betwixt them thereof to be made. 14 *R.* 2. c. 11.

32. The fees in sessions for traversing, trying, or discharging indictments, discharging recognizances of the peace and good behaviour, and the like, do vary according to the custom of the country; and in that place the custom of the place is to be observed. *Dalt. c.* 41. Fees in sessions

By *Holt Ch. J.* The court cannot commit for non payment of fees; for if there is right, there is remedy; and *indebitatus assumpsit* will lie, if the fee is certain; if uncertain, *quantum meruit*. *L. Raym.* 703.

Precept to summon the sessions.

Dublin. **J.** *P. and K. P. esquires, justices of our sovereign lord the king, assigned to keep the peace in the county of ———— aforesaid, and also to bear and determine divers felonies, trespasses and other misdemeanors committed in the said county, and one of us of the quorum; To the sheriff of the same county, greeting: On the behalf of our said sovereign lord the king, we command you, that you omit not, by reason of any liberty within your county, but that you enter therein, and that you cause to come before us, or others, justices assigned to keep the peace in the said county, and also to bear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, on ——— the ——— day of ——— now next ensuing, at the hour of ten in the forenoon*

noon of the same day, at — in the said county, 24 good and lawful men of the body of the county aforesaid, then and there to enquire, present, do and perform, all and singular such things, which on the behalf of our said sovereign lord the king shall be enjoined them: Also that you make known to all coroners, keepers of gaols and houses of correction, high constables, and bailiffs of liberties, within the county aforesaid, that they be then there to do and fulfil those things which by reason of their offices shall be to be done: Moreover, that you cause to be proclaimed through the said county in proper places the aforesaid sessions of the peace to be held at the day and place aforesaid: And do you be then there, to do and execute those things which belong to your office: And have you then there as well the names of the jurors, coroners, keepers of gaols, and of houses of correction, high constables, and bailiffs aforesaid, as also this precept. Given under our seals at A. in the county aforesaid, the — day of — in the — year of the reign of —.

When the sheriff hath received this precept, he must direct several warrants to the several bailiffs of hundreds and liberties, containing in them the substance of the said precept.

The stile of the sessions.

Dublin. **T**HE general quarter sessions of the peace, holden at — in and for the said county, on the — day of — in the — year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, before J. P. and K. P. esquires, and others, justices of our said sovereign lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and of the quorum, and so forth.

Condition of a recognizance to appear and give evidence at the sessions, in case where the king is a party.

THE condition of this recognizance is such, that if the abovebound A. W. shall personally appear at the next general quarter sessions of the peace, to be holden at — in and for the county of — and then and there give such evidence as he knoweth, against — concerning his felonious taking and carrying away — the property of — and do not depart thence without leave of the said court, then this recognizance to be void.

Subpœna to give evidence, in case where the king is not party.

GEORGE the third — To A. W. B. W. and C. W. of — yeomen, greeting. We command you, and every of you, that all business being laid aside, and all excuses ceasing, you do in your proper persons appear before our justices assigned to keep our peace in the county of — and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at the session of the peace to be holden at — in and for the said county,

on — the — day of — now next ensuing, at the hour of ten in the forenoon of the same day, to testify all and singular those things, which you, or any of you, shall know, in a certain appeal now depending between the churchwardens and overseers of the poor of the parish of — appellants, and the churchwardens and overseers of the poor of the parish of — removants, touching and concerning the removal of A. P. from the said parish of — [Or, in case where the king is a party, — to testify the truth and give evidence on our behalf, against A. O. in a case of trespass and assault] And this you and every of you are in no wise to omit, under the penalty of 10l. for you and every of you. Witness J. P. esquire, the — day of —.

Note; There may be four witnesses put in one subpœna.

A subpœna ticket for a witness.

MR. A. W. By virtue of a writ of subpœna, to you and others directed, and herewith shewn unto you, you are required personally to be and appear at the next general quarter sessions of the peace to be holden at — in and for the county of — to testify the truth according to your knowledge in a certain appeal now depending, between the churchwardens and overseers of the poor of the parish of — appellants, and the churchwardens and overseers of the poor of the parish of — removants, concerning the removal of A. P. from the said parish of — to the said parish of — on the part of the said appellants: And herein you are not to fail, on pain of 10l. Dated the — day of — in the — year —.

Sheep.

1. **B**Y the Eng. stat. 8 Eliz. c. 3. No person shall send or take into any ship, any rams, sheep, or lambs alive, to be carried out of England, Wales, or Ireland, or any of the queen's dominions, upon pain that every such person, their aiders, abettors, procurers and comforters, shall for their first offence forfeit all their goods, the one moiety to the queen, the other moiety to him that will sue for the same. *f. 1.*

2. Every such offender shall suffer imprisonment one year, and at the year's end shall in some market town, in the fulness of the market, have his left hand cut off, to be nailed up in the openest place of such market; and every person oftsoons offending against this statute, shall be adjudged a felon. *f. 2.*

3. Provided, that this act shall not extend to any corruption of blood, or be prejudicial to any woman claiming dower. *f. 3.*

4. The justices of oyer and terminer, justices of gaol-delivery, and justices of peace, shall have power to inquire of every offender contrary to this act, and to hear and determine every offence contrary to the same. *f. 4.*

But the offender may have his clergy, as well in the case of the cutting off his hand, as in the case of felony. *3 Inst. 104.*

5. And by the 10 & 11 Car. 1. cap. 15. No person shall pull the wool off any living sheep, instead of shearing or clipping of them; and the justices

ces of assize at the general assizes, and the justices of peace at their quarter-sessions, shall have power to inquire of and determine offences contrary to this act, and to punish offenders, by fine and imprisonment, as they shall think fit.

6. Also by the *Eng. Stat. 12 C. 2. c. 32*. No person shall export, or lay on board with intent to export any sheep, except wether sheep for the ship's use only; on pain of forfeiting the same, and for every sheep 20s. half to the king, and half to him that shall sue, at the sessions or elsewhere. And the owner of the ship, knowing the offence, shall forfeit his interest in the ship and furniture. And the master and mariners assisting, shall forfeit, in like manner, all their goods and chattels, and be imprisoned three months. And any merchant or other person offending herein, shall be disabled to require any debt or account from any factor or other. And the offender may be tried in the county from whence they were exported, or where he shall be apprehended. Prosecution to be in one year. And if the ship belongs to an alien, it shall be forfeited to the king.

7. By 9 *Ann. c. 11*. If any person shall maliciously, unlawfully, and willingly maim, kill, or destroy any sheep or other cattle of any person whatsoever, every such offence shall be adjudged felony.

8. And by the 17 *G. 2. c. 5*. Every person who shall kill, cut open, or skin any sheep or lamb, with an intent to steal the whole or any part of the fat, flesh, skin or carcass thereof; or shall thereout take the fat, or take away any part of the flesh or carcass, or skin thereof, with an intent to steal the same; or shall maliciously kill, maim or wound, with an intent to destroy any one or more of the cattle aforesaid, and his accessories before the fact, and every person who shall receive or buy any tallow, fat, or suet, or the skin or carcass, or any part thereof, of any such cattle aforesaid, from such offender, knowing the same to be so unlawfully taken, being thereof convicted, shall suffer death as in cases of felony, without benefit of clergy, or of any statute.

If any person, guilty of any of the offences aforesaid, shall within ten days after such offence committed, and before his conviction, first discover one or more of his or her accomplices therein, so as such accomplice or accomplices be convicted of such offence, the offender, so first discovering, shall be clearly acquitted and discharged of and from such his or her offence, and be intitled to a reward not exceeding five pounds.

Sheriff.

1. **S**HERIFF (*Shireve*) in Saxon is *Scirgerefa*, from *sciran*, to share or divide, for that the whole realm is parted and divided into shires; and *gerefa*, the comes, earl, or governor, in the *Belgick* called *graef* or *grave*. The word *comes*, or *count*, came first into Europe out of the eastern countries, probably from the Hebrew *cone* or *cune*, which denoteth strength, firmness, or stability; and the word *county*, in Latin *comitatus*, seemeth to be nothing else but the division or allotment over which the *comes* or *count* had jurisdiction. And when the counts or earls left the custody of the counties, then was the custody thereof committed to the *viscounts*, or *vicecomites* (which is the *Latin* name for the sheriffs); so called, because they supply the

the place of the *comes* or earl. The *earl* was otherwise called by the Saxons *eorl*, *ealdor*, *ealdorman* (elder, or alderman), because they were usually men of age and experience; by a like derivation as that of *senators* among the *Romans*.

2. By four several statutes it is enacted, that none shall be sheriff, except ^{Who shall be} he have sufficient land within the shire, to answer the king and his people. ^{sheriff.}

9 *Ed. 2. ft. 2.* 4 *Ed. 3. c. 9.* 5 *Ed. 3. c. 4.* 13 & 14 *C. 2. c. 21.*

3. At the common law, the sheriff was chosen by the county; but now ^{How chosen.} by the statute of the 14 *Ed. 3. c. 7.* he shall be appointed yearly on the morrow of *All Souls*, at the exchequer, by the chancellor, treasurer, and chief baron, taking to them the chief justices.

Except in *London*, and where the office is a man's freehold or inheritance.

23 *H. 6. c. 8.*

4. The sheriff at the entering upon his office shall take the following ^{His oath of} oath (to be administred in pursuance of a writ of *dedimus protestatem*.) ^{office.}

I A. B. do swear, that I will well and truly serve the king's majesty in the office of sheriff in the county of — and promote his majesty's profit in all things that belong to my office, as far as I legally can or may; I will truly preserve the king's rights, and all that belongeth to the crown; I will not assent to decrease, lessen, or conceal the king's right, or the rights of his franchises; And whensoever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchises, suits, or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again; and if I may not do it myself, I will certify and inform the king thereof, or some of his judges; I will not respite or delay to levy the king's debts, for any gift, promise, reward, or favour, where I may raise the same without great grievance to the debtors; I will do right, as well to poor as to rich, in all things belonging to my office; I will do no wrong to any man, for any gift, reward, or promise, nor for favour or hatred; I will disturb no man's right, and will truly and faithfully acquit at the exchequer, all those of whom I shall receive any debts or duties belonging to the crown; I will take nothing whereby the king may lose, or whereby his right may be disturbed, injured, or delayed; I will truly return, and truly serve all the king's writs, according to the best of my skill and knowledge; I will take no bailiffs into my service, but such as I will answer for, and will cause each of them to take such oaths as I do, in what belongeth to their business and occupation; I will truly set and return reasonable and due issues of them that be within my bailiwick, according to their estate and circumstances, and make due panels of persons able and sufficient, and not suspected, or procured, as is appointed by the statutes of this realm: I have not sold or let to farm, nor contracted for, nor have I granted or promised for reward or benefit, nor will I sell or let to farm, nor contract for, or grant for reward or benefit, by myself or any other person for me, or for my use, directly or indirectly, my sheriffwick, or any bailiwick thereof, or any office belonging thereunto, or the profits of the same, to any person or persons whatsoever; I will truly and diligently execute the good laws and statutes of this realm; and in all things well and truly behave myself in my office, for the honour of the king, and the good of his subjects, and discharge the same according to the best of my skill and power: So help me God. 3 *G. c. 15.* f. 18, 19.

Sheriff calling
inferior offices.

5. By the 4 H. 4. c. 5. The sheriff in person shall continue within his bailiwick, and shall not let it to farm.

6. By the 1 H. 5. c. 4. Sheriff's officers shall not be attornies.

And the sheriff shall return none of his officers upon inquests : on pain of 40*l.* half to the king, and half to him that shall sue, in the sessions, or elsewhere. 23 H. 6. c. 10.

8. The bailiffs or other person returning juries, or intermeddling with processses, shall take the following oath of office, before a judge of assize, or the *custos rotulorum*, or two justices of the peace (1 Q.)

*I A. B. shall not use or exercise the office of bailiff corruptly, during the time that I shall remain therein, neither shall or will accept, receive, or take, by any colour, means, or device whatsoever, or consent to the taking of any manner of fee or reward of any person or persons, for the impanelling or returning of any inquest, jury, or tales, in any court of record, for the king, or betwixt party and party, above 2*s.* or the value thereof, or such fees as are allowed and appointed for the same by the laws and statutes of this realm, but will according to my power, truly and indifferently, with convenient speed, impanel all jurors, and return all such writ or writs touching the same, as shall appertain to be done by my duty or office, during the time that I shall remain in the said office : So help me God.* 10 C. 1. ff. 3. c. 18. f. 2.

And persons acting before they have taken the said oath, shall forfeit 40*l.* half to the king, and half to him that shall sue, in the sessions, or other court of record. *id.* f. 4, 6.

And if they commit any act contrary to their said oath, they shall forfeit (in like manner) to the party grieved his treble damages. *id.* f. 5.

And the sheriff's bailiffs shall not be in the same office in three years after. 1 H. 5. c. 4.

The sheriff's
two courts;
the tourn, and
county court.

9. The sheriff hath a jurisdiction both in criminal and civil cases; and for this purpose he hath two courts, his *tourn* for criminal causes, which is therefore the king's court; the other is his *county court* for civil causes, and this is the court of the sheriff himself. 3 Salk. 322.

Sheriff's re-
ceiving the ac-
counts of his
predecessor.

10. The new sheriff being appointed and sworn, he ought at or before the next county court, to deliver a writ of discharge to the old sheriff, who is to set over all the prisoners in the gaol severally by their names (together with all his writs) precisely, by view and indenture between the two sheriffs; wherein must be comprehended all the actions which the old sheriff hath against every prisoner, though the executions are of record. And till the delivery of the prisoners to the new sheriff, they remain in the custody of the old sheriff, notwithstanding the letters patents of appointment, the writ of discharge, and the writ of delivery. Neither is the new sheriff obliged to receive the prisoners, but at the gaol only. But the office of the old sheriff ceases, when the writ of discharge cometh to him. Wood b. 1. c. 7.

Sheriff how
far amenable
to the justices
of the peace.

11. The sheriff having a justice of the peace his warrant directed to him, shall execute the same; but he need not go in person to execute it, but may authorize another to do it. 2 Haw. 86.

And

And it is no excuse to the sheriff to return that he could not execute a precept because of resistance; for he may take with him the power of the county. 13 Ed. 1. st. 1. c. 39.

Also the sheriff, on summons, is bound to attend the sessions of the peace, there to return his precepts, to take the charge of the prisoners, to receive fines for the king, and the like. 2 Haw. 41.

And it seems clear from the general reason of the law, which gives all courts of record a kind of discretionary power over all abuses by their own officers, that the sheriff is punishable by the justices in sessions, for defaults in executing their writs and precepts. 2 Haw. 142, 143.

12. Every sheriff is a principal conservator of the peace, by the common law, and may *ex officio*, award process of the peace, and take surety for it; and it seems to be the better opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation. 2 Haw. 33.

Sheriff a conservator of the peace, but not to act as justice.

But no sheriff shall exercise the office of a justice of the peace, in any county wherein he is sheriff; and in such case, his acts as a justice shall be void. 7 W. 3. c. 13. s. 3.

And by the same act, No under-sheriff or sheriffs clerk, or any in trust for them, shall officiate as clerk of the peace for the same county he shall so act as under-sheriff, under the penalty of five hundred pounds for every time he shall so act, to be recovered by such persons who will sue for the same, in any of her majesty's four courts of *Dublin*, by bill, plaint, or information, in which no essoin, &c. shall be allowed, and to be distributed as aforesaid.

13. By the 14 Ed. 3. c. 10. and 19 H. 7. c. 10. The sheriff shall have the keeping of gaols.

Sheriff to have the keeping of gaols.

And in all *civil* causes, as in cases of imprisonment for debt, the sheriff or gaoler (at the election of the party) shall be answerable for escapes suffered by the gaoler; but if the gaoler suffer a *felon* voluntarily to escape, this inasmuch as it reacheth to life, is felony only in the gaoler, but the sheriff may be indicted, fined, and imprisoned. 1 H. H. 597.

14. Where the sheriff levies money on a *fieri facias*, the plaintiff may have an action of debt against him for the money, because it was received by him to the plaintiff's use, and the defendant is discharged of it; and it lies against his executors if he die. 3 Salk. 323.

Sheriff answerable for money levied by him.

17. No sheriff shall continue in his office above one year, 14 Ed. 3. c. 7. 28 Ed. 3. c. 7. Except in towns being counties of themselves, and where the office is a man's freehold, or inheritance. 23 H. 6. c. 8. 3 G. c. 15. s. 21.

How long he shall continue.

And by the 1 R. 2. c. 11. None that hath been sheriff shall be so again within three years, if there be other sufficient.

But by the 17 Ed. 4. c. 6. The sheriff may hold his office after the year, during *Michaelmas* and *Hilary* terms, if not before lawfully discharged.

18. If the sheriff shall die before his office shall be expired, the under-sheriff shall execute the same in the deceased sheriff's name, till a new sheriff be sworn, and be answerable for the execution thereof, as the deceased sheriff would have been. 12 G. 1. c. 4. s. 6.

Sheriff dying before the expiration of his office.

By the act 6 G. 1. c. 6. The sheriff's court leet, or county court, shall be always held in the most convenient place, in each barony, which lies nearest

Sheriff.

nearest to the center of the same, and at a seasonable time in the day, after the hour of nine in the morning, on pain that the sheriff or under-sheriff offending herein, shall be fined by the justices at the next assizes or sessions, on complaint and proof made thereof, before them upon oath. *f. 16.*

And by the 3 G. 2. c. 7. No sheriff shall appoint any person to be a barony clerk within his county; and in case of such appointment, no person shall take upon him to hold any court, or exercise any power or authority under colour thereof; and if any sheriff offend herein, he shall forfeit for every such offence fifty pounds; which sum may be recovered by action in any of his majesty's four courts in *Dublin*, wherein no essoin, &c. shall be allowed, by any persons who shall sue for the same. *f. 3.*

And if any person shall take upon him to exercise the said pretended office of barony-clerk, upon information given thereof upon oath unto any justice of the peace of the county within which he shall so exercise the same, such justice shall upon such information, unless sufficient bail shall be given by such offender, commit him to the county goal, until the next assizes to be held for the said county, where if he shall be convicted of such offence, the judges of assize before whom he shall be so convicted, shall commit him to the said county gaol for three months, and shall also fine him for such offence, in a sum not exceeding fifty pounds.

Also by the 3 G. 3. c. 28. *Whereas gaolers frequently pay large sums or engage to pay a rent to such persons who have the power of appointing them, and thereby apprehend they have a right to continue therein independent of the authority of the persons so appointing them, and use every unwarrantable means to reimburse themselves the sums by them paid, or the rent agreed to be paid for the said offices:* no sheriff having power to appoint a gaoler, shall by themselves, or any other person in trust for them, take any fee or gratuity, or reserve any rent payable out of any such gaol for such appointment, under the penalty of five hundred pounds; one moiety thereof to be paid to the king, the other to the informer, with full costs of suit, who shall by bill, plaint, or information in any of his majesty's courts of record first sue for the same. *f. 13.*

Ships.

By the act 4 G. 1. c. 4. If any person besides those impowered by the officer of the customs and the constables, shall enter or endeavour to enter on board any ship in distress, without the leave of the commander, or of the officer of the customs or constable, or one of them; or in case any person shall molest them in the saving of the ship or goods, or shall endeavour to hinder the saving of such ship or goods, or shall deface the marks of any such goods before the same shall be taken down in a book by the commander and the first officer of the customs, such person shall within twenty days make double satisfaction to the party grieved, at the discretion of the two next justices of the peace, or in default thereof, shall by such justices be sent to the next house of correction where he shall be employed in hard labour twelve months. *f. 3.*

And it shall be lawful for any commander or superior officer of the ship in distress, or for the officer of the customs or constable on board the ship,
to

Ships.

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to repel by force any such in distress, and thereby molest them in the preservation of the ship.

If any person shall make or be assisting in the making any hole in any part of any ship in distress, or shall steal any pump belonging to any ship, or shall be aiding or abetting in the stealing such pump, or shall wilfully do any thing tending to the immediate loss or destruction of such ship, such persons shall be guilty of felony without benefit of clergy. *f. 4.*

If any person shall put forth any false or treacherous lanthorns, lights or fires, with intention to subject any ship to danger or shipwreck, such persons being thereof convicted, shall be guilty of felony without benefit of clergy. *f. 5.*

And by the 11 G. 2. c. 9. If any owner of, or captain, master, or mariner, or other officer belonging to any ship, shall wilfully cast away, sink, burn, or otherwise destroy, the ship of which he is owner, or to which he belongeth, or in any manner direct or procure the same to be done, to the prejudice of any persons, bodies politic or corporate, that shall underwrite or execute any policy of insurance thereon, or of any merchants that shall load goods thereon, and shall be convicted thereof, such persons so offending, shall be adjudged guilty of felony without the benefit of clergy, or of the statute made in the ninth year of queen Anne, for taking away the benefit of clergy in certain cases, &c.

Shoemakers.

BY the act G. 3. c. 33. *f. 13.* To prevent frauds in the making of shoes and boots, no person shall sell or expose to sale any shoes or boots, unless the name of the maker of such boots or shoes shall be stamped upon the inside of the top of such boots, and the inside of the lap of such shoes, in plain and legible characters; and in case any person shall sell or expose to sale, any boots or shoes not stamped as aforesaid, such person shall for every such pair of boots and shoes so sold or exposed to sale, forfeit two pounds six shillings, to be recovered as herein after is mentioned.

The said penalties shall be recovered upon conviction by the confession of the party, or by the oath of one credible witness, before one justice of the peace of the place where the offence shall be committed, and shall be levied by way of distress, upon the goods of the offender, by warrant under the hand and seal of the justice before whom such conviction shall be, returning the overplus, the said forfeitures to go to the informers. *f. 14.*

Slander.

I Do not find it any where clearly settled, how far slander, or scandalous words are cognizable before justices of the peace, by reason of the different circumstances in matters of so indeterminate a nature; for the same words, when spoken of different persons, and even of the same person with a different emphasis and manner of delivering them, may receive a very different interpretation.

In

In general, it seemeth that words which directly tend to a breach of the peace, as if one man challenge another, are cognizable before justices of the peace, for which the party may be bound to the good behaviour, and even indicted. 2 *Salk.* 698. 1 *Keb.* 931.

But if they do not tend directly to a breach of the king's peace, but are matters only of private slander between party and party, which no way affect the publick administration of justice, as in case where the common people are wont to call one another knaves, and rogues, and whores, and thieves; I do not find it asserted by any good authority, that justices of the peace have any jurisdiction at all in such matters: but the proper remedy seems to be in one of these two ways, either by a prosecution in the spiritual court, or by an action upon the case at the common law.

In the former case, it is provided by the statute of *Circumspecte agatis*, 13 *Ed.* 1. and also by the statute of the 9 *Ed.* 2. c. 4. that in matters of defamation, no prohibition shall lie to the spiritual court from the courts temporal: But Bishop *Gibson* says, that in order to secure causes of defamation in the spiritual court, against prohibitions, they must have these two incidents; 1. That they concern matters merely spiritual. 2. That they concern mere spiritual matter only, and not mixt with any matter determinable at common law. And the prosecution in this court must be only for the punishment of sin, and the welfare of the soul; for the party cannot sue there for amends or damages. *Gibf.* 1070.

But the remedy in such case (as hath been said) must be by action in the courts temporal, if the words will bear it: But it seems very difficult, for the reasons abovementioned, to define what words are actionable, and what not. The most general rule seems to be, that words are then most properly actionable, when they are spoken of a person in relation to his profession or calling, and not when spoken at large without any such particular application.

And by the 10 *C.* 1. ff. 2. c. 6. f. 14. Actions upon the case for slanderous words, shall be brought within two years after the words spoken, and not after: and if the jury find the damages under 40s. the plaintiff shall have no more costs than damages. 2 *G.* 1. c. 11. f. 14.

But if the words spoken are not in themselves actionable, and damages are given to the plaintiff for a consequential loss only, there the plaintiff may have larger costs. And the distinction is this: The statute expressly mentions actions of *slander*; but if the words are such, as give the party an action in respect of the special damage resulting therefrom, and are not in themselves actionable, it is not properly an action of slander, but a special action on the case; and therefore is not with this statute. *E.* 12. *G.* 2. *Bafs* and *Hickford.* *Andr.* 375.

M. 17 *G.* 2. *Underwood* and *Parks.* In an action for words, the defendant pleaded *not guilty*, and offered to prove the words to be true, in mitigation of damages: But *Lee* Ch. J. refused to admit the same, saying, that at a meeting of all the judges upon a case that arose in the common pleas, a large majority of them had determined, not to allow it for the future, but that it shall be *pleaded*, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. *Str.* 1200.

Finally, there is one species of slander, of which the law takes a more especial notice; and that is, when it relates to the great men of the realm:

Concerning

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Concerning whom, it is enacted by the 3 Ed. 1. c. 34. 2 R. 2. ft. 1. c. 5. and 12 R. 2. c. 11. *that none shall tell or publish any false news or tales; whereby discord, or occasion of discord or slander may grow, between the king and his people, or the great men of the realm; and that none shall devise, speak, or tell any false news or lies, of any prelates, lords, judges, or other great men of the realm, whereof any discord or slander may arise; on pain of imprisonment, until he hath brought into court the first author of the tale; and if he cannot find the author, he shall be punished by advice of the council.*

Publish any false news or tales] But this extends only to extrajudicial slanders; for if a man charge them in due course of law, although the charge be false, yet there will lie no action *de scandalis magnatum*, neither at common law, nor by these statutes. 2 Inst. 228.

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FOR soldiers inlisting into foreign service, see title, **Foreign Service.**
The antient military order was, when the king was to be served with soldiers for his war, a knight or esquire of the county, that had revenues, farmers, and tenants, would covenant with the king by indenture inrolled in the exchequer, to serve the king for such a term with so many men specially named in a list, in his war. 1 Inst. 71.

And in consequence hereof, there are many regulations by divers statutes concerning the same, which are now out of use.

But the present regulations concerning the soldiery (the militia excepted) are chiefly contained in the yearly acts against mutiny and desertion; the substance whereof, so far as justices of the peace and other civil officers are concerned, is contained in the following sections.

This act, commonly called the mutiny bill, is only annual; but as it has been passed annually for several years, it will probably be continued with few variations.

This act, and every thing herein contained, shall be in force within the realms of *Great Britain and Ireland*, from the twenty fourth day of *March* one thousand seven hundred and sixty four, until the twenty fifth day of *March* one thousand seven hundred and sixty five.

4 S I. Articles

- I. Articles of war.
- II. Inlisting soldiers.
- III. Muster.
- IV. Carriages.
- V. Billetting.
- VI. Destroying the game.
- VII. Sued for debt.
- VIII. Guilty of crimes.
- IX. Pay.
- X. Deserting.
- XI. Setting up trades after their discharge.

I. Articles of war.

The king may form articles of war for better government of the forces, and constitute courts martial, with power to try any crime by such articles of war. 3 G. 3. c. 7. § 53.

But no person shall be adjudged to suffer any punishment extending to life or limb, by the said articles, except for crimes expressed to be so punishable by this act. § 54.

II. Inlisting soldiers.

When any person shall be inlisted, he shall in four days, but not sooner than 24 hours, be carried before the next justice, or chief magistrate of a town corporate (not being an officer in the army) and before him shall be at liberty to declare his dissent to such inlisting; and on such declaration, and returning the inlisting money, and paying 20s. for the charges expended on him, he shall be forthwith discharged, in presence of such magistrate: But if he shall refuse or neglect in 24 hours to return and pay such money as aforesaid, he shall be deemed to be inlisted, as if he had given his assent thereto before such magistrate. If he declare that he voluntarily inlisted himself, the justice or chief magistrate shall forthwith certify under his hand, that such person is duly inlisted, setting forth the place of his birth, age and calling (if known) and that the second and sixth sections of the articles of war against mutiny and desertion were read to him, and that he has taken the oath mentioned in the said articles of war: And if any person so certified as duly inlisted shall refuse to take the said oath of fidelity before such magistrate, the officer from whom he hath received such money, may detain and confine him till he shall take it: And every military officer that shall act contrary hereto, or offend herein, shall incur the like penalty as is by this act inflicted for making a false muster, to be recovered as any penalties by this act are recoverable. § 69.

Which said second and sixth sections of the articles of war are these:

(S E C T.

(S E C T. II.)

Art. 1. Whatsoever officer or soldier shall presume to use traitorous or disrespectful words against the sacred person of his majesty, his royal highness the prince of *Wales*, or any of the royal family; if a commissioned officer, he shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court martial.

Art. 2. Any officer or soldier who shall behave himself with contempt or disrespect towards the general, or other commander in chief of our forces, or shall speak words tending to his hurt or dishonour, shall be punished according to the nature of his offence, by the judgment of a court martial.

Art. 3. Any officer or soldier who shall begin, excite, cause or join in any mutiny or sedition, in the troop, company, or regiment, to which he belongs, or in any other troop or company in our service, or on any party, post, detachment, or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a court martial shall be inflicted.

Art. 4. Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, does not use his utmost endeavours to suppress the same, or coming to the knowledge of any mutiny, or intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by a court-martial with death, or otherwise, according to the nature of the offence.

Art. 5. Any officer or soldier who shall strike his superior officer, or draw, or offer to draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court martial.

(S E C T. VI.)

Art. 1. All officers and soldiers, who having received pay, or having been duly enlisted in our service, shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a court martial shall be inflicted.

Art. 2. Any non-commissioned officer or soldier, who shall, without leave from his commanding officer, absent himself from his troop or company, or from any detachment with which he shall be commanded, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court martial.

Art. 3. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company, in which he last served, on the penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him,

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him, and give notice thereof to the corps in which he last served, he the said officer so offending shall by a court martial be cashiered.

Art. 4. Whatsoever officer or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert our service, shall suffer such punishment as shall be inflicted upon him by the sentence of a court martial.

And the *oath* mentioned in the said articles of war, is as follows :

I swear to be true to our sovereign lord king George, and to serve him honestly and faithfully, in defence of his person, crown, and dignity, against all his enemies or opposers whatsoever : And to observe and obey his majesty's order, and the orders of the generals and officers set over me by his majesty.

And the justices certificate of the whole may be this :

Dublin. **I** Do hereby certify, that A. S. of the age of ——— years, born at ——— in the county of ——— shoemaker, came this day before me ——— one of his majesty's justices of the peace for the said county of ——— and declared that on the ——— day of ——— now last past, he did voluntarily enlist himself as a private soldier to serve his said majesty king George the third, in the regiment of foot commanded by ——— and that he now freely consenteth unto the same : And thereupon I do hereby also certify, that he the said A. S. is duly enlisted as aforesaid ; and that the second and sixth sections of the articles of war against mutiny and desertion were also before me read unto him this day, and that he hath also at the same time taken before me the oath mentioned in the said articles of war. Given under my hand at ——— in the said county of ——— the ——— day of ———.

But if any person shall receive the enlisting money knowing it to be such, and shall abscond, or refuse to go before such magistrate, in order to declare his assent or dissent, he shall be deemed to be listed, and may be proceeded against as if he had taken the said oath before such magistrate. 3 G. 3. c. 7. s. 70.

III. Muster.

Every commissary or muster master, upon any muster to be made, shall give convenient notice thereof to the mayor, or other chief officer, of the place where the soldiers are quartered ; who shall be present at every such muster, and give his utmost assistance for the discovering of any false muster : And every muster master neglecting to give such notice, or refusing the assistance of such mayor or other officer, shall forfeit 50 l. and his office. And no muster roll shall be allowed, unless signed by such mayor or other officer : But if such mayor or officer shall not attend, or refuse to sign such muster roll, without giving sufficient reason for such his refusal ; then the commissary may proceed to muster, and such muster roll shall be allowed, though not signed as aforesaid, provided that oath be made before a justice in 48 hours after such muster ; and the said muster roll shall be then produced, and examined

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amined by the said justice, who shall sign the same, if there appear to be no sufficient objection to it. *f. 13.*

And the commissary or muster master shall make oath (for which no fee shall be taken) before the mayor or chief magistrate attending the muster, if such mayor or chief magistrate be a justice of the peace, or otherwise before a justice in the form following; I *A. B.* do swear, that I saw at the time of making the within muster, such men or horses as are borne, and not respited, on the muster roll, for which men or horses a signed certificate or certificates are not indorsed on the back of the roll, certifying their being absent from the muster, by reason of being employed on some other duty of the regiment, or by being sick, in prison, or furlough, or at grass, or by a signed leave from the colonel or field officer, or officer commanding the regiment, troop, or company.

Which oath the said commissary shall insert and subscribe on the back of the muster roll transmitted by him into the office of the commissary general of the musters. *f. 16.*

And if any person shall give a false certificate, to excuse any soldier from muster or other service, on pretence of being employed on some other duty of the regiment, or of sickness, being in prison, or on furlough; he shall forfeit 50*l.* and be cashiered and disabled to hold any military office. And no certificate shall excuse the absence of any soldier, but for the reasons abovementioned, or one of them; and the commissary shall set down on the roll, at the time of taking the muster, the reason of such absence, and by whom certified; and not to set down any such excuse, without view of such certificate. *f. 10.*

And every officer that shall make any false muster of man or horse, and every commissary, muster master, or other officer, who shall wittingly allow or sign the muster roll, wherein any such false muster is contained, or shall take any reward for mustering or signing muster rolls, shall be cashiered and disabled. *f. 11.*

And if any person shall be falsely mustered; or offer himself to be falsely mustered; on proof thereof by oath of two witnesses, before the next justice, and on certificate thereof under the hand of the commissary, or chief magistrate as aforesaid, he shall be committed to the house of correction for ten days: And if any person shall wittingly furnish a horse to be mustered, he shall be forfeited to the informer, if he shall belong to the person furnishing the same; otherwise the offender shall forfeit to the informer 20*l.* on oath by two witnesses, before the next justice, by distress; and if he shall have no sufficient distress, or shall not pay in four days after conviction, he shall be committed to the common gaol for three months, or be publicly whipped, at the discretion of the justice; and the informer, if a soldier, shall be discharged, if he demands it. *f. 14.*

But fictitious names allowed by his majesty's order upon the muster rolls, for the maintenance of widows of officers who lost their lives in the late war, or during the late rebellion, shall not be construed a false muster. *f. 12.*

IV. Carriages.

IV. Carriages.

For provision of carriages for the forces in their march, or for their arms, cloaths, and accoutrements, any justice of the peace, being duly required thereunto, by any order from his majesty, or the general of his forces, or the master general, or lieutenant-general of his majesty's ordnance, shall on such order being brought and shewn unto him, by the quarter master, adjutant, or other officer of the regiment, troop, or company ordered to march, issue out his warrant to the constables or petty constables of the division, liberty, hundred, or precinct from, through, near, or to which such forces shall be ordered to march; requiring them to make such provision for carriages, with able men to drive the same, as is mentioned in the said warrant; allowing them sufficient time to do the same, that the neighbouring parts may not always bear the burden: And if sufficient carriages cannot be provided within any such liberty, division, or precinct, then the next justice (or justices) of the county, riding, or division, shall on such order as aforesaid so brought or shewn to him, issue his warrant to the constables or petty constables of such next county, riding, division, or precinct, for the purposes aforesaid, to make up such deficiency. *f. 40.*

Which warrant may be thus:

Dublin. { To the constable of ———

BY virtue of an order from ——— general of his majesty's forces, this day brought and shewn unto me ——— one of his majesty's justices of the peace for the said county, by ——— lieutenant in captain ———'s company of his majesty's regiment of foot, commanded by ——— you are hereby required to provide ——— sufficient carriages, with able men to drive the same, within your constablewick, whereby to remove the arms, cloaths, and accoutrements of the said company on their march from ——— to ——— in ——— in the said county; and with them you are to appear at ——— aforesaid to-morrow precisely at five of the clock in the morning. Herein fail you not, as you will answer the contrary at your peril. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the ——— year ———.

And the officer, who by virtue of the said warrant is to demand the carriages of the constable to whom it is directed, shall at the same time pay down to him in hand for the use of the persons who shall provide such carriages and men, the sum of 1*s.* for every mile any waggon with five horses shall travel; and 1*s.* for every mile any wain with six oxen, or four oxen with two horses shall travel; and 9*d.* for every mile any cart with four horses shall travel; and so in proportion for less carriages: For which the constable shall give a receipt. *f. 40.*

And such constable, or petty constable, shall appoint such persons having carriages within their respective liberties, as they shall think proper, to provide and furnish such carriages and men. *id.*

And

And if any military officer shall force any carriage to travel more than one day's journey; or shall not discharge the same in due time for their return home; or shall suffer any soldier or servant (except such as are sick), or any woman to ride in such carriage; or shall force any constable, by threatnings, to provide saddle horses for themselves or servants; or shall force horses from the owners, by themselves, servants, or soldiers; he shall forfeit 5*l.* proof thereof being made on oath before two justices, who shall certify the same to the paymaster general, or other paymaster of the forces, who shall pay the same, according to the order of the said justices under their hands and seals, who shall deduct the same out of the officer's pay. *id.*

And no waggon, wain, cart, or carriage, shall be obliged to carry above thirty hundred weight. *s.* 44.

And if any high or petty constable shall wilfully neglect or refuse to execute such warrants for providing carriages; or if any person appointed by such constable to furnish any carriage and man, shall refuse or neglect to provide the same; or any other person shall wilfully hinder the execution thereof, he shall forfeit not exceeding 40*s.* nor less than 20*s.* to the poor of the parish where such offence shall be committed; the same to be heard and determined by two justices dwelling in or near the place, who shall cause the penalty to be levied by distress. *s.* 41.

By the act 6 *Ann. c.* 14. Upon the march of any regiment, troop or company, or detachment, the quartermaster, agent, or some other officer belonging to the same, shall produce the orders of the chief governors of this kingdom, or a true copy thereof, signed by the commanding officer of such regiment or detachment, to some justice of the peace, or to the chief magistrate of the place where such carriages are to be provided. *s.* 3.

Which justice or chief magistrate shall upon sight of such orders, or of a true copy thereof so signed, issue their warrants to the constables within their respective districts, or to the constables of the next adjacent barony, hundred, or district, requiring them within twelve hours at farthest, to provide a sufficient number of carriages, so as the same does not exceed three wheel cars or six slide cars for each troop or company.

And upon receipt of such warrant, such constables are required to make provision of such cars and horses within their respective districts or parishes, within the time aforesaid, and to get the same in readiness; and in case any constable shall neglect his duty herein, such offender shall forfeit ten shillings, to be recovered for the use of the poor of the parish, before the justice or magistrate who shall sign such warrant, the party offending being duly convicted on the oath of one credible witness.

If any military officer, for the use of whose troop, company, or detachment, such carriages shall be provided, shall force the owner or driver of any car or carriage to travel with his carriage more than one day's march, according to the rout, or shall not discharge the same within two hours after they come to the end of such day's march, or shall suffer any soldier, or servant, or any woman, to ride in any car or carriage so provided, or shall force any constable or petty constable by menace, or otherwise, to provide saddle-horses for such officers or their servants, or shall take by force any horses from the owners thereof, every such officer shall for every such offence forfeit 40*s.* proof thereof being first made upon oath, before one of her majesty's justices of the peace for the same county, or before the chief magistrate

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magistrate of the place where such offence shall be committed, who are to make certificate thereof to the paymaster-general, who is required, upon the receipt of such certificate, to pay the aforesaid sum of 40s. to the party injured, and the said paymaster is impowered to deduct the same out of such officer's pay. *f. 4.*

No wheel-car or carriage shall be loaden with above four hundred pounds weight, nor any slide-car with above two hundred pounds weight. *f. 5.*

But by the 15 G. 2. c. 6. Whereas since the making of the act 6 Ann. c. 14. the troops and companies have been greatly augmented, and by the present establishment each company of foot is to consist of seventy private men, three serjeants, three corporals, and two drums, and each troop of horse or dragoons of forty private men, so that the number of carriages provided by the said act, will not be sufficient; upon the march of any regiment, troop, company, or detachment, the justices of the peace or chief magistrate shall issue their order to the constables as in the said former act, to provide a sufficient number of carriages, so as the same do not exceed five wheel cars, or ten slide cars, for each troop or company, for which three pence *per* mile for each wheel car, and the sum of one penny halfpenny *per* mile for every slide car shall be paid; which sums to be advanced, shall be repaid by the vice-treasurer without fee, and so in proportion upon any future augmentation or reduction of the number of men in the troop and company upon the establishment of this kingdom.

And by the 3 G. 2. c. 10. No owner of carriages, *for the baggage of soldiers in their march*, shall be compelled to take any loading, or be forced to proceed in the march with the respective carriages, until such time as the officer or other person who shall require such carriage, shall pay down in hand to the owner or his servant, for every mile or reputed mile they are to march, threepence for every wheel-car, and one penny halfpenny for every slide-car; which sums so to be advanced, shall be repaid to such officer by the paymaster-general or vice-treasurer without fee, on oath made by such officer before one justice of the peace, or the chief magistrate of any city or town-corporate, of his having paid such sums for carriage. *f. 1.*

Nor shall the owner of such carriage be obliged to take any loading until the same shall be first duly weighed, at the expence of the owners, if they shall think fit, and the same can be done in a reasonable time without hindrance of his majesty's service.

And if the officer or other person requiring such carriage, shall compel the owner of such carriage to take any loading until the same shall be first duly weighed, if the same can be done in a reasonable time, without hindrance of his majesty's service, or shall contrary to the will of the owner of such carriage, or his servant, permit any persons to put any greater load upon any carriage than as is herein before directed, either at the time of loading, or in the march, every such officer shall forfeit ten shillings, proof thereof being first made upon oath before one of his majesty's justices of the peace for the same county, or the chief magistrate of the place where such offence shall be committed, who are to make certificate thereof to the paymaster-general of his majesty's forces, who is required to pay the same to the party injured, or other person producing the said certificate, and to deduct the same out of the pay of such officer.

If

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If by the negligence of the constables in providing carriages the officer or other person requiring such carriage, should be necessitated to take the said carriage another day's march, such officer or other person shall for every mile or reputed mile the said carriage shall be compelled to march, beside what shall be paid for the said first day, pay three pence *per* mile for every wheel-car, and for every slide-car one penny halfpenny *per* mile; which sums so to be advanced, shall be repaid to such officer, in such manner as the sums are to be paid for the first day's march. *f. 2.*

And if such officer or person requiring such carriage, shall neglect to pay down to the owner of such carriage the sums hereby appointed to be paid for such further day's march, they shall forfeit 20s. *sterl.* to be paid to the person injured, on such proof, and in such manner as is herein before appointed.

Whereas farmers and carriers coming to markets from places at a great distance at such markets, have been detained, and employed in carrying such baggage, to their great loss, and the discouragement of trade; no car or carriage coming to any markets shall be detained or employed in carrying such baggage on any pretence whatsoever. *f. 3.*

V. Billetting.

By the act 6 *Ann. c. 14.* No officer, soldier, or trooper in her majesty's army, nor the servant of any officer, nor any attendant on the train of artillery, nor any yeoman of the guard or battle-axes, nor any officer commanding the said yeomen, nor any servant of any such officer, shall receive or be allowed any quarters, save only during such time as they shall be on their march, or during such time as they shall be in some sea-port town, or other place in the neighbourhood of a sea-port town, in order to be transported, or during such time as there shall be any commotion in any part of this kingdom, by reason of which emergency her majesty's army, or any considerable part thereof, shall be commanded to march from one part of this kingdom to another. *f. 8.*

And no civil magistrate or constable shall be obliged to find quarters for or give billets to other soldiers than those only whose true christian and surnames shall be delivered to him in writing, under the hand of the officer at the time such quarters or billets are desired, all which names shall be written together, and delivered in one piece of paper, signed as is afore-said, and the christian and surnames of every soldier to be quartered or billeted, together with the name of the person on whom they shall be billeted or quartered, shall be given in writing by the constable or civil officer billeting or quartering such soldier, and be contained in the billet given by such civil officer. *f. 11.*

VI. Destroying the game.

If any officer or soldier shall, without leave of the lord of the manor under his hand and seal, take or kill any hare, coney, pheasant, partridge, pigeon, or other fowl, poultry, or fish, or his majesty's game, and be convicted thereof on oath of one witness, before one justice; every officer so offending

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offending shall forfeit 5*l.* to the poor; and the commanding officer upon the place, for every offence committed by any soldier under his command, shall forfeit 20*s.* to be paid and distributed in manner aforesaid. And if, upon conviction by the justices, and demand thereof made by the constable or overseers of the poor, he shall not in two days pay the said penalties, he shall forfeit his commission. *Brit. stat. 3 G. 3. c. 8. s. 47.*

And by the 6 *Ann. c. 14.* If any officer or soldier shall without leave of the respective lords of the manor, under their hands and seals first obtained, take, kill, or destroy any hare, coney, partridge, pheasant, pigeon, or any other sort of fowl or poultry; or if any officer or soldier shall destroy any fish, or her majesty's game, and shall be thereof convicted upon the oath of one credible witness, before any justice of the peace, who is hereby authorized to hear and determine the same; every officer so offending, and being so convicted, shall forfeit five pounds, to be distributed by the said justices amongst the poor of the place where such offence shall be committed; and every officer commanding in chief upon the place, for every such offence committed by any soldier under his command, and of which such soldier shall be so convicted, shall forfeit ten shillings, to be paid and distributed in manner aforesaid: and if upon such conviction and demand made of such penalties by the constable or overseer of the poor of the parish where such offence shall be committed, such officer shall by the space of ten days neglect to pay the said penalties, such officer shall forfeit, and is hereby declared to have forfeited his commission, and his commission is hereby declared void. *s. 10.*

VII. Sued for debt.

No volunteer shall be taken out of the service, by any process, other than for some criminal matter, unless for a real debt, or other just cause of action, and unless affidavit be made before a judge of the court, or before some person authorized to take affidavits in such court, that the original sum due amounts to 10*l.* a memorandum of which oath shall be indorsed on the process; and if he shall be otherwise arrested, the judge may discharge him, and award costs. *Br. st. 3 G. 3. c. 7. s. 64.*

But the plaintiff, on notice given in writing of the cause of action to such person, or left at his last place of residence before listing, may file a common appearance, in an action to be brought for any debt, so as to intitle him to proceed therein to judgment and outlawry, and to execution, other than against his body. *s. 53.*

VIII. Guilty of crimes.

The king may appoint courts martial, for trial of the offences of soldiers, by the articles of war. *Br. st. 3 G. 3. c. 7. s. 65.*

And every officer and soldier who shall begin, excite, cause, or join in any mutiny or sedition, or shall not use his utmost endeavours to suppress the same, or shall not give immediate notice thereof to his commanding officer, or shall desert, or list in any other regiment, or shall be found sleeping on his post, or shall leave it before relieved, or shall hold correspondence with the enemy,

my, or strike or use any violence against his superior officer in the execution of his office, or shall disobey his lawful commands, shall suffer death, or such other punishment as a court martial shall inflict. *f. 1.*

But the trial of offences by a court martial shall not exempt them from the ordinary process of law. *f. 9.*

And if any officer or soldier shall be accused of any capital crime, or of any violence or offence against the person, estate, or property of any of the king's subjects, the commanding officer shall use his utmost endeavour to deliver over such accused person to the civil magistrate; and shall also be aiding to the officers of justice, in seizing and apprehending him, in order to bring him to trial; on pain, on conviction before two justices, by the oaths of two witnesses, of being *ipso facto* cashiered and disabled; provided the conviction be affirmed at the next sessions, and a certificate thereof be transmitted to the judge advocate, who shall certify the same to the next court martial. *f. 58.*

But no person acquitted or convicted of capital offences by the civil magistrate, shall be punished for the same by a court martial, otherwise than by cashiering. *f. 37.*

By the *Br. ft. 19 G. 2. c. 21.* Soldiers convicted of profane cursing or swearing, and not paying the penalty, shall not be committed to the house of correction as other offenders, but shall be put in the stocks for one hour, for every single offence; and for any number of offences, of which they shall be convicted at one and at the same time, two hours.

Also by the *6 Ann. cap. 14. sect. 1.* No detachment of soldiers above fifteen in number, shall march through any part of this kingdom, without one commissioned officer, which officer shall, under pain of forfeiting his commission, constantly march with the said soldiers or troops, and keep them together and entire, and shall be answerable for all trespasses and offences, which the soldiers under his command, or any of them, shall commit in their marches, and shall give satisfaction for the same, in manner as hereafter is mentioned, that is to say, *f. 10.*

If any soldiers or trooper, during their march, shall commit any trespass or other offence, to the damage of any of her majesty's subjects, the officer commanding such soldier or trooper, upon complaint of the party injured, or of any other on his behalf, is required to cause immediate reparation or restitution to be made to such persons; and in default thereof, the party injured, or some other on his behalf, is empowered to repair to the next justice of the peace for the county, or to the chief magistrate where such offence shall be committed, and by oath of the party injured, or of any other credible person, to prove before such justice or chief magistrate, the particulars of the damage done to such persons by any such soldier or trooper.

Whereupon the said justice or chief magistrate is required to ascertain the damage sustained by the party complaining, by certificate under his hand and seal, for which no fee is to be taken; and in case such officer, upon producing and tendering to him such certificate, do not pay such damage so certified, within six hours, to the party complaining or producing such certificate, every such officer shall forfeit five pounds, to be paid by the paymaster-general or his deputy, without delay, fee, or reward, to the party producing such certificate; and the said penalty or forfeiture is, by the said pay-

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master-general, to be deducted out of the pay of such officer so offending.

No detachment of soldiers, under fifteen in number, shall march without a serjeant or corporal, which serjeant or corporal is constantly to march with such detachment, and keep them entire, under pain of being cashiered or of suffering corporal punishment, at the election of the officer commanding such detachment. *f. II.*

And in case any soldier or trooper shall, in their march, commit any trespass or other offence, to the damage of any of her majesty's subjects, upon complaint thereof to such serjeant or corporal, immediate restitution or reparation shall be made to the party complaining, by such serjeant or corporal; and in default thereof, the party injured is impowered to prove his damage, and to procure a certificate thereof in manner before-mentioned.

And upon producing such certificate to the officer, to whose company or troop such soldier or trooper shall belong, such officer is required immediately to pay the sum certified, not exceeding forty shillings, to the party complaining or producing such certificate, of which sum so paid the said officer, is to deduct one moiety out of the pay of the serjeant or corporal that marched with such detachment, and the other moiety out of the pay of the soldiers committing such trespass.

But in case such officer shall neglect to pay the sum certified as aforesaid, within twelve hours after producing to him such certificate, such officer, for every such neglect, shall forfeit five pounds, to be paid and stopped in manner as is above-mentioned.

IX. Pay.

The officer who shall receive the pay or subsistence money, shall immediately, upon receipt thereof, give public notice to all persons keeping inns or other places where soldiers are quartered, to repair to their quarters, at such time as they shall appoint for distribution thereof to the officers and soldiers, which shall be within four days after receipt thereof: And the said innkeepers and others shall be first paid, before any part of the pay be distributed to the officers or soldiers; provided the accounts exceed not for a commission officer of horse under the degree of a captain, for diet and small beer 2 s. a day; nor for a commission officer of dragoons under the degree of a captain 1 s. nor for a commission officer of foot under the degree of a captain 1 s. and for each horse 6 d. nor for one light horseman's diet, and hay and straw for his horse 1 s. nor for one dragoon's diet, and hay and straw for his horse 1 s. nor for one foot soldier's diet 4 d. And if any officer shall not give such notice, and shall not immediately, on producing such account, pay the same, on complaint and oath made thereof by two witnesses at the next sessions, the paymaster (on certificate of the justices in such sessions of the sum due, and to whom the same is owing) shall pay the same out of the said officer's arrears, on pain of forfeiting his office, and disability; and if no such arrears be due, the paymaster shall deduct the sums to be paid, pursuant to the justices certificate, out of the next pay of the regiment; and such officer shall for such his offence, or for neglecting to give such notice, be *ipso facto* cashiered. And where it shall happen, that the subsistence money due to any officer or soldier shall by any accident not be paid, or such officer or soldier shall

shall neglect to pay the same; or where any forces shall be upon their march, so that no subsistence can be remitted to them, or they shall neglect to pay the same; every such officer shall, before his departure out of his quarters, make up the accounts with every person with whom such soldiers shall have quartered, and sign a certificate thereof, and give the same to the party to whom such money is due, with the name of the regiment, troop, or company to which he shall belong, that the same may be transmitted to the paymaster, who shall immediately pay the same, under pain as is before directed for non-payment of quarters. 3 G. 3. c. 7. s. 33.

X. Deserting.

The constable may take up any person reasonably suspected to be a deserter, and carry him before a justice in or near the place, who shall examine such suspected person; and if by his confession, or the oath of one witness, or the knowledge of such justice, he shall be found to be a deserter, the justice shall forthwith cause him to be conveyed to the county gaol, or house of correction, and transmit an account thereof to the secretary at war; and the keeper of such gaol or house of correction shall receive the subsistence of such deserter, for his maintenance while he shall be in custody, but shall not be intitled to any fee for his imprisonment. *Br. ft. 3 G. 3. c. 7. s. 49.*

But no officer may break open any house to search for deserters, without a justice's warrant; on pain of 20*l.* *s. 52.*

And if any person shall knowingly harbour or assist any deserter, he shall forfeit 5*l.* and if any person shall knowingly buy or exchange, or otherwise receive any arms, cloaths, or furniture, belonging to the king, from any soldier or deserter, or change the colour thereof, he shall forfeit 5*l.* and on conviction by the oath of one witness, before one justice, the said penalties shall be levied by distress; half the first penalty to be to the informer, by whose means such deserter shall be apprehended; and half the last penalty to the informer; and half of both, to the officer to whom the deserter did belong; and if such person have not sufficient, or shall not pay the penalty in four days, the justice shall commit him to gaol for three months, or cause him to be publicly whipped. *s. 51.*

So much of this act as relates to the punishment of mutineers and deserters within this realm, and such who shall conceal deserters, or shall knowingly buy, exchange, or otherwise receive any arms, cloaths, caps, or other furniture belonging to the king, from any soldier or deserter, or cause the colour of such cloaths to be changed, shall extend to all intents and purposes whatsoever, to such governors or other officers in garrisons and forces, as his majesty has now in pay, or shall have in pay in *Ireland*, and shall be put in execution in that kingdom by all justices of the peace and other officers respectively, according to the tenor and during the continuance of this act.

[And here it may be requisite to animadvert upon a custom, which hath unaccountably prevailed, for justices of the peace at their discretion to prolong the time limited by the officers in the soldiers' furloughs. No law gives, nor ever did give to them, any such power; and it might be very prejudicial to the publick service, if it should be in the power of a justice of the peace, when a soldier's immediate presence is wanted, as it may be at any time, by lengthening the furlough, to prevent the soldier's attendance. In case

case of sickness, or other unavoidable accident, it may be useful for a justice to certify upon the back of the furlough such necessity, specially setting forth the same, to prevent his being apprehended as a deserter, or punished at his return. But, nevertheless, such certificate is no way obligatory or conclusive, and a justice of the peace hath no more to do with it than any other credible person or persons.]

XI. Setting up trades after their discharge.

By the 22 G. 2. c. 44. All officers, mariners, and soldiers who have been employed in his majesty's service, and not deserted, may set up and exercise such trades as they are apt for, in any town or place within *Great Britain* or *Ireland* (except *Oxford* and *Cambridge*); and if they shall be sued thereupon, they shall have double costs.

And by the 3 G. 3. c. 8. with regard to officers, mariners, soldiers, and marines, who have served since Nov. 29, 1748, it is enacted more at large, as followeth: Whereas there have been and are divers officers, mariners, soldiers, and marines, who have served in the late war, some of whom used trades, others were apprentices who had not served out their times, and others by their own industry have made themselves apt and fit for trades; many of which, the war being now ended, would willingly employ themselves in those trades they were formerly accustomed to, or which they are apt or able to follow, but may be hindered from exercising the same in certain cities, corporations, and other places, because of certain by-laws and customs of those places, and of the statute of the 5 *Eliz.* prohibiting the use of certain trades by any person who hath not served 7 years apprenticeship; it is enacted, that all such officers, mariners, soldiers, and marines, who have served since the said 29th day of Nov. 1748, and not deserted, and also their wives and children, may set up and exercise such trades as they are apt and able for, in any town or place within *Great Britain* or *Ireland* (except *Cambridge* and *Oxford*) without any molestation by reason of the using of such trade; nor shall they, or their wives or children, during the time they shall exercise such trades, be removable from such place to their last legal place of settlement, by virtue of any law now in being, relative to the settlement of the poor, until they shall become actually chargeable; and if they shall be sued for exercising such trade, they shall have double costs. And two justices may cause such officer, mariner, soldier, or marine, to be summoned before them in the town or place where they shall exercise such trade, in order to make oath of the place of their last legal settlement; which summons they shall obey, and make oath accordingly. And the justices shall give an attested copy of such affidavit so made before them, to the person making the same, in order that he may produce it when required. Which attested copy shall at any time be admitted as evidence as to such settlement, at any general or quarter sessions. And if he shall be summoned again to make oath as aforesaid; on such attested copy being produced, he shall not be obliged to make any further oath with regard to his settlement, but shall leave a copy of such attested copy of his examination, if required.

OUT

OUT of the *Latin* word *pax*, the *Normans* formed their *paix*, and we (out of that) our *peace*. Lamb. 5.

Surety for the peace is the acknowledging a recognizance, or bond, to the king, taken by a competent judge of record, for the keeping the peace. *Dalt. c. 116.*

And this surety of the peace, every justice of the peace may take and command by a twofold authority: 1. As a minister, commanded thereto by a higher authority: as when a writ of *supplicavit*, directed out of the chancery or king's bench, is delivered to him. 2. As a judge, and by virtue of his office, derived from his commission. *Dalt. c. 116.*

Concerning which I will shew,

- I. For what cause surety of the peace shall be granted.
- II. At whose request it shall be granted.
- III. Against whom it shall be granted.
- IV. In what manner it shall be granted.
- V. How the peace warrant may be superseded.
- VI. How the peace warrant shall be executed.
- VII. What ought to be the form of a recognizance of the peace.
- VIII. How such recognizance shall be certified.
- IX. How such recognizance may be forfeited.
- X. How the recognizance being forfeited shall be proceeded on.
- XI. How such recognizance may be discharged.

I. For what cause surety of the peace shall be granted.

1. By the commission of the peace, one or more justices have power to cause to come before them, all those who to any of the king's people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace or their good behaviour towards the king and his people; and if they shall refuse to find such security, to cause them in the king's prisons to be safely kept, until they shall find such security.

2. Upon which Mr. *Hawkins* observes, that it seemeth clear, that where-ever a person has just cause to fear, that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the party's giving him satisfaction upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatened to beat him, or lain in wait for that purpose; and that he doth not require it out of malice, or for vexation. 1 *Haw. 127.*

3. Also.

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3. Also it seems the better opinion, that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection, that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment; and yet there is no doubt, but that one threatened to be beaten, may demand the surety of the peace. *Haw. 127.*

4. But if the justice shall perceive that surety is demanded merely of malice, or for vexation only, without any just cause of fear, it seemeth he may safely deny it. As in common experience we find it, that where a person shall upon a just cause come and crave the peace against another, and hath it granted to him; when such other person shall come before the justice, he likewise will crave the peace against the former, and will perhaps surmise some cause; but yet will nevertheless be content to surcease his suit and demand, so as the other will relinquish to have the peace against him: Here the justice shall do well not to be too forward in granting the peace thus required by the latter, but to persuade him, and to shew him the danger of his oath which he is to take; but yet if he will not be persuaded, but will take his oath, that he is in fear, where indeed he neither doth fear, nor hath cause to fear, this oath shall discharge the justice, and the fault shall remain on such complainant. *Dalt. c. 116.*

5. Also, if a man will require the peace, because he is at variance, or in suit with his neighbour, it shall not be granted. *Dalt. c. 116.*

6. Also, Mr. *Lambard* says, he takes it to be somewhat clear, that a justice may not by the commission award a precept of the peace, in behalf of a man that will require it, because he feareth that he will do harm to his servants or cattle. *Lamb. 83.*

And Mr. *Dalton* says, where a man is in fear that another will hurt his servants, or his cattle, or other goods, this surety of the peace shall not be granted by the justice. But in this case *Fitzherbert* saith, the party may have a special writ out of the chancery directed to the sheriff, that he shall cause such person to find surety, that he shall do no hurt or damage to the other man, in his body, or to his servants or goods; and if he will not find surety, that then he shall arrest and detain him in prison, until he shall find surety. *Dalt. c. 116.*

And the reason why a man may not have sureties of the peace against another, for that he feareth he will do harm to his servants, seemeth to be, because it should be the servant's fear in such case, and not the master's; and the servant's own oath before the justice is necessary. And as to his goods, it seemeth clear, that no sureties of the peace ought to be granted in that case; for the recognizance of the peace when taken, is only that the party shall keep the peace towards the king and all his liege people.

But Mr. *Dalton* says, that if a man shall threaten to hurt his wife, or child, he thinks he may crave the peace at the justice's hands, by the words of the commission, and that the justice ought to grant it. *Dalt. c. 116.*

7. Note also, the surety of the peace shall not be granted, but where there is a fear of some present or future danger, and not merely for a battery or trespass that is past, or for any breach of the peace that is past; for this surety of

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of the peace is only for the security of such as are in fear: But the party wronged may punish the offender by indictment; and the justice, if he see cause, may bind over the affrayer. *Dalt. c. 116.* That is, he may bind him over to answer unto the indictment.

II. At whose request it shall be granted.

1. As to this, Mr. *Hawkins* says, It seems to be agreed at this day, that all persons whatsoever, under the king's protection, being of *sane memory*, whether they be natural and good subjects, or *aliens*, or *excommunicate*, or attainted of *treason*, have a right to demand surety of the peace. And it is certain, a *wife* may demand it against her husband threatening to beat her outrageously, and that a *husband* also may have it against his wife. 1 *Haw.* 126. *Crom.* 118.

Upon which master *Crompton* observeth, that if the wife in such case cannot find sureties, she shall be committed; and so, says he, a man may be rid of a shrew. *Crom.* 118.

2. And Mr. *Dalton* says, an infant under the age of 14 years, may demand this surety, and it shall be granted him. *Dalt. c. 117.*

3. But as to a person of *non sane memory*, Mr. *Dalton* says, this surety shall neither be granted against him nor to him upon his own request; but yet if there shall be cause, the justice ought to provide for his safety. *Dalt. c. 117.*

III. Against whom it shall be granted.

There seems to be no doubt, but that it ought, upon a just cause of complaint, to be granted by any justice of the peace, against any person whatsoever, under the degree of nobility, being of *sane memory*, whether he be a magistrate or private person, and whether he be of full age, or under age. But infants and *femes covert* ought to find security by their friends, and not to be bound themselves. And the safest way of proceeding against a *peer*, is by complaint to the court of chancery or king's bench. 1 *Haw.* 127.

IV. In what manner it shall be granted.

1. It seemeth certain, that if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offers sureties; and from hence it follows *a fortiori*, that he may be commanded by word of mouth to find sureties, and committed for his disobedience: But it is said, that if he be absent, he cannot be committed without a warrant from some justice in order to find sureties, and that such warrant ought to be under seal, and to shew the cause for which it was granted, and at whose suit (that the party may provide his sureties), and that it may be directed to any indifferent person. 1 *Haw.* 128.

2. The justice may make the warrant, to bring the party before himself or some other justice, or he may make it to bring the party before himself only;

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only; for he that maketh the warrant for the most part hath the best knowledge of the matter, and therefore he is the fittest to do justice in the case. 5 C. 59.

3. As to the granting process of the peace or good behaviour, out of the chancery or king's bench, it is enacted by 10 & 11 C. 1. c. 10. that it shall not be granted but upon motion in open court, and declaration in writing and upon oath, to be exhibited by the party desiring such process, of the causes for which such process shall be granted; the motion and declaration to be mentioned on the back of the writ. And if it shall afterwards appear, that the causes are untrue, the court may order costs to the party grieved, and commit the offender till paid.

V. How the peace warrant may be superseded.

1. It is said, that if one who fears that the surety of the peace will be demanded against him, find sureties before any justice of the same county, either before or after a warrant is issued against him, he may have a *superseas* from such justice, which shall discharge him from arrest from any other justice, at the suit of the same party, for whose security he has given such surety. 1 Haw. 129.

2. In which *superseas* it is not necessary to name either the sureties, or the sums in which they are bound; but yet it is the better form to express them both. Dalt. c. 1. 8.

3. Also, it is said, that an appearance upon a recognizance for the peace may be superseded, by finding sureties in the chancery or king's bench, and purchasing a writ testifying the same; but this practice having been often abused, it is enacted by 10 & 11 C. 1. c. 10. that no writs of *superseas* shall be granted out of the chancery or king's bench, but upon motion in open court, and on such sufficient sureties as shall appear on oath to the court, to be assessed in the subsidy book at 5*l.* lands, or 10*l.* goods, and unless it shall also first appear to the court, that the process of the peace or good behaviour is prosecuted against him, desiring such *superseas bona fide* by some party grieved in that court, out of which the *superseas* is desired to be awarded: 1 Haw. 129.

VI. How the peace warrant shall be executed.

1. It can be executed only by the persons to whom it is directed, or some of them, unless it be directed to the sheriff, who may either by parol, or by precept in writing, authorize an officer sworn and known, to serve it, but cannot empower any other person without a precept in writing. 1 Haw. 128.

2. It seems generally agreed, that where a person authorized by warrant of a justice of the peace, to compel a man who is sheltered in an house, to find sureties for the peace or good behaviour, is denied quietly to enter into it, he may justify breaking open the doors, in order to take him; but he must first signify to those in the house the cause of his coming, and request them to give him admittance. 2 Haw. 86.

3. If the warrant specially direct that the party shall be brought before the justice who made it, the officer ought not to carry him before any other; but

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but if the warrant be general, to bring him before any justice of such place, the officer has the election to bring him before what justice he pleaseth, and may carry him to prison for refusing to find surety before such justice. 1 Haw. 128.

4. And if the party is carried before another justice, and not before him who issued the warrant, such other justice must take the surety, and bind him by recognizance in all points as the form of the precept doth require. And thereupon such other justice, having so taken surety of the peace, may and ought upon request, to make his *supersedeas* to all officers, and to all other justices of the same county; and thereby the said party shall be discharged from finding other surety, and from any other arrest for the same cause. But by such *supersedeas*, the other justice cannot discharge the warrant of the first justice, until the party be bound indeed, nor give any other day to the party to appear. Dalt. c. 118.

5. If the warrant be in the common form, requiring the officer to cause the party complained of to come before the justice to find sufficient surety, and if he shall refuse so to do, to convey him immediately to prison, without expecting any further warrant, until he shall willingly do the same, the officer who serves it, before he makes any arrest, ought first to require the party to go with him, and find sureties according to the purport of the warrant; but upon refusal to do either, that is, either to go before the justice, or to find sureties, he may carry him to the gaol by force of the same warrant, without more. 1 Haw. 128. Dalt. c. 118.

And yet the constable, or officer, may bring him in that case before the justice; and if he refuses there to give sureties, he may commit him without any farther warrant or *mittimus*. 2 H. H. 112.

Nevertheless, notwithstanding these great authorities, it may not be convenient for the justice, to leave so much to the constable's judgment, as to determine what shall or shall not be deemed a refusal to find such sureties; for that the constable is constituted a judge in such case by no law. And much less doth it seem adviseable, to require in the warrant, as is usual, that the constable shall carry the party to gaol, if he shall refuse to find sufficient sureties; for it doth not appear how the constable can any way be deemed a competent judge of that; for it is certain, that he cannot administer an oath to such sureties, or others, whereby to inform himself of such sufficiency.

6. If the officer do arrest the party, and do not carry him before the justice to find sureties; or upon the refusal of the party, if the officer shall arrest him, and do not carry him to the gaol, in both these cases the officer is punishable by the justices for this neglect, by indictment and fine at their sessions: And also the party arrested may have his action of false imprisonment for the arrest: for where the officer doth not pursue the effect of his warrant, his warrant will not excuse him of that which he hath done. Dalt. c. 118.

7. When the party cometh before the justice, he must offer sureties, or else the justice may commit him; for the justice needeth not to demand surety of him. Dalt. c. 118, 169.

8. If the justice was deceived in the sufficiency of the sureties, he or any other justice may afterwards compel the party to find and put in other sufficient

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cient sureties, and may take a new recognizance for the same. *Dalt. c. 116, 119.*

9. But if the sureties die, the party principal shall not be compelled to find new sureties. *Dalt. c. 119.* Because their executors or administrators are liable.

10. Also if a man, that was bound to keep the peace, hath broken his bond, the justices ought of discretion to bind him anew. *Lamb. 78.*

But not until he be thereof convicted by due course of law; for before conviction, he standeth indifferent, whether he hath forfeited his recognizance or not. *Crom. 125.*

VII. What ought to be the form of a recognizance for the peace.

1. The recognizance, which the justice takes for the keeping of the peace, is rather of congruity, than by any express authority given either by the common law, or by statute. *Dalt. c. 168.*

2. If it is taken in pursuance of a writ of *supplicavit*, it must be wholly governed by the directions of such writ: But if it be taken before a justice, upon a complaint below, it seems that it may be regulated by the discretion of such justice, both as to the number and sufficiency of the sureties, and the largeness of the sum, and the continuance of the time for which the party shall be bound. And it hath been said, that a recognizance to keep the peace as to any person, for a year, or for life, or without expressing any certain time (in which case it shall be intended for life) or without fixing any time or place for the party's appearance, or without binding him to keep the peace against all the king's people in general, is good. *1 Haw. 129.*

3. However it seems to be the safest way, to bind the party to appear at the next sessions of the peace, and in the mean time to keep the peace as to the king and all his liege people, especially as to the party, according to the common form of precedents. *1 Haw. 129.*

VIII. How such recognizance shall be certified.

If it be taken by force of a writ of *supplicavit*, it needs not be certified till the justice receive a writ of certiorari to that purpose. But if it be taken upon a complaint below, it must be certified, sent, or brought to the next sessions, by force of the statute of the 3 *H. 7. c. 1.* that the party so bound may be called. *1 Haw. 130.*

IX. How such recognizance may be forfeited.

1. There are divers things which may be done against the peace, and divers offences for which an indictment against the peace will lie; and yet the committing or doing such offence or act shall be no forfeiture of the recognizance for the peace; for that the act that shall cause a forfeiture of such recognizance must be done or intended unto the *person* as is aforesaid, or in terror of the people. Therefore to enter into lands, where he ought to bring his action; or to disseise another of his lands; or to enter into lands

lands or tenements with force, being without offer of violence to any man's person, and without publick terror; or to do a trespass in another man's corn or grass; or take away another man's goods wrongfully, so it be not from his person; or to steal another man's horse, or other goods feloniously, being not from his person: all these and the like, are breaches of the peace, and yet these will make no breach of this recognizance, nor breach of the peace within the meaning of the commission of the peace.

Dalt. c. 121.

2. More particularly; The recognizance is forfeited, if the party make default of appearance, and the same default shall be recorded. 3

H. 7. c. 1.

However, if the party have any excuse for his not appearing, it seems that the sessions is not bound peremptorily to record his default, but may equitably consider of the reasonableness of such excuse. 1 *Haw. 130.*

And Mr. *Dalton* says, in case of the sickness of the party, so that he cannot appear, he has known that the justices, upon due proof thereof have forbore to certify or record such forfeiture or default; and that they have taken sureties for the peace of some friends of his present in court, until the next sessions; for that the principal intent of the recognizance was but the preservation of the peace. But the query is how this is warrantable by their oath. *Dalt. c. 120.*

3. Also there is no doubt, but that it may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others through his procurement; as manslaughter, rape, robbery, unlawful imprisonment, and the like. 1 *Haw. 130.*

4. Also it hath been holden, that it may be forfeited by any treason against the king's person, and also by any unlawful assembly in terror of the people, and even by words directly tending to a breach of the peace, as by challenging one to fight, or in his presence threatening to beat him. 1 *Haw. 130.*

Otherwise it is if the party be absent; and yet if the party so bound shall threaten to kill or beat a person who is absent, and after shall lie in wait for him to kill or bait him, this is a forfeiture of the recognizance.

Dalt. c. 121.

5. However, it seems that it shall not be forfeited by bare words of heat and choler, as the calling a man a knave, teller of lies, rascal, or drunkard; for though such words may provoke a cholerick man to break the peace, yet they do not directly challenge him to it, nor does it appear that the speaker designed to carry his resentment any farther: and it hath been said, that even a recognizance for the good behaviour shall not be forfeited for such words; from whence it follows *a fortiori*, that a recognizance for the peace shall not. 1 *Haw. 130.*

6. Also, there are some actual assaults on the person of another, which do not amount to a forfeiture of such recognizance; as if an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a parent in a reasonable manner chastize his child; or a master his servant, being actually in his service at the time; or a schoolmaster his scholar; or a gaoler his prisoner; or even a husband his wife, as some say; or if one confine a friend who is mad, and

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and bind and beat him, in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; or if a man beat another (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess him of his land or goods, or the goods of another delivered to him to be kept, and will not desist upon his laying his hands gently on him, and disturbing him; or if a man beat, or as some say, wound, or maim one who makes an assault upon his person, or that of his wife, parent, child, or master, especially if it appear that he did all he could to avoid fighting before he gave the wound; or if a man fight with or beat one who attempts to kill any stranger; or if a man even threaten to kill one, who puts him in fear of death, in such a place where he cannot safely fly from him; or if one imprison those whom he sees fighting, till the heat is over. 1 Haw. 130, 131.

X. How the recognizance being forfeited shall be proceeded on.

It is said, that the justices cannot in any case proceed against the party, for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace; but that the recognizance itself, with the record of default of appearance, ought to be removed into some of the courts at *Westminster*, who shall proceed by *scire facias* upon such recognizance: and so it ought to be, if it be presented by the jury, or great inquest, that the party hath forfeited his recognizance, by breach of the peace. 1 Haw. 130. *Dalt. Old Ed. c. 70.*

XI. How such recognizance may be discharged.

1. He who is bound to the peace, and to appear at a certain day, must appear at that day, and record his appearance, although he who craved the peace cometh not to desire that it may be continued; otherwise the recognizance cannot be discharged. *Dalt. c. 120.*

2. If the recognizance be made to keep the peace generally, without any time or day limited, it shall be construed to be during the party's life; and this the justice may do upon reasonable cause: but if such surety be so taken, during the offender's life, neither the king, nor the justice, nor the party, can release or discharge it: and therefore the justice must be well advised, how he granteth such surety. *Dalt. c. 119, 120.*

3. But it seems to be agreed, that it may be discharged by the death or demise of the king in whose reign it was taken, or of the principal party who was bound thereby, if it were not forfeited before. 1 Haw. 129.

4. Also it hath been holden, that it may be discharged by the release of the party at whose complaint it was taken, being certified together with it; but this may be justly questioned, because the recognizance is not to the subject but to the king; and consequently cannot be discharged by the subject,

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ject, who is not a party to it : however, such a release will be a good inducement to the court, to which such a recognizance shall be certified, to discharge it. 1 *Haw.* 129.

5. And if a man be bound to keep the peace towards the king and all his people, but not towards any person certain, and to appear at such a sessions, the court at that sessions may make proclamation, that if any man can shew cause, why the peace granted against such a one shall be continued, he shall speak ; and if no person cometh to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him. But if a man be bound as aforesaid, and *especially to keep the peace towards a certain person*, there though such person cometh not to desire the peace may be continued, yet the court by their discretion may bind him over till the next sessions, and that may be to keep the peace against that person only if they shall think good ; for it may be that the person who first craved the peace is sick, or otherwise letted, so as he cannot come to that sessions to demand the continuance of the peace further. *Dalt.* c. 120.

6. Also it is certain, that such a recognizance cannot be pardoned or released by the king, before it is broken ; because the subject hath a kind of interest in it ; but being forfeited, then the king, and no other, may release and pardon the forfeiture. 1 *Haw.* 129.

7. And it is said, that the sureties are not discharged by their death ; but that their executors or administrators (as hath been said) do continue bound. 1 *Haw.* 129. *Dalt.* c. 120.

8. Likewise if the party be imprisoned for default of sureties, and after, he that demandeth the peace against him happen to die ; it seemeth the justice may make his liberate or warrant for the delivery of such prisoner, for after such death, there seemeth no cause to continue the other in prison. Also, any justice may, upon the offer of such prisoner, take surety of him for the peace, and may thereupon deliver him. *Dalt.* c. 118.

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A MAN may be compelled to find sureties, both for the good behaviour and for the peace : and yet the good behaviour includeth the peace : and he that is bound to the good behaviour, is therein also bound to the peace. *Dalt.* c. 122.

This surety for the good behaviour being of near affinity to surety for the peace, both as to the manner in which it is to be taken, superseded, and discharged, it seemeth not to require a particular consideration, save only as to these two points ;

I. For

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I. For what misbehaviour it is to be required.

II. For what it shall be forfeited.

I. For what misbehaviour it is to be required.

1. It doth not appear that the conservators of the peace at common law had any power as touching the *good behaviour*, further than as it had a relation to the *peace*; and not as it is contra-distinguished from it. And it seemeth, that the power which the justices of the peace do exercise at this day, in relation thereto, doth solely depend upon the commission of the peace, and the statute of the 34 *Ed. 3. c. 1* (Except in some special instances wherein the power of binding to the good behaviour is given to them by particular statutes, which pertain not to this general title.)

2. The words in the commission are these: *We have assigned you, jointly and severally, and every one of you, our justices to keep our peace — and to cause to come before you, or any of you, all those who to any one or more of our people, concerning their bodies, or the firing their houses, have used threats, to find sufficient security for the peace, or their good behaviour, towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept.*

3. The statute of the 34 *Ed. 3. c. 1.* as to this matter runs thus: *In every county shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the law; and they shall have power to restrain the offenders, rioters, and all other barators, and to pursue, arrest, take, and chastise them according to their trespasss or offence; and to cause them to be imprisoned and duly punished, according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform them, and to inquire of all those that have been pillers and robbers in the parts beyond the sea, and be now come again, and go wandring, and will not labour as they were wont in times past; and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the king and his people, and the other duly to punish, to the intent the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders.*

4. This statute seems to have had in view chiefly the disorders to which the country was then liable, from great numbers of disbanded soldiers, who having served abroad in the wars of that victorious king, were grown strangers to industry, and were rather inclined to live upon rapine and spoil. *Barl. 524.*

5. But whatever the natural and obvious sense of it may be, when compared with the history and circumstances of those times, it is certain that

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it hath been carried much farther by construction, and the purport of it hath been extended by degrees, until at length there is scarcely any other statute, which hath received such a largeness of interpretation.

And that I may proceed with clearness in a matter so essential to the office of a justice of the peace, I will set down the several expositions which have been given of this statute from time to time, by learned men; and then raise such observations thereupon, as the subject will naturally suggest.

6. The first unfolding of the sense of this statute which has occurred, was in the case of Sir *Richard Croftes* and Sir *Richard Corbet*, in the second year of the reign of king *Hen. 7.* wherein it was resolved by all the judges for that purpose assembled, that he who is bound to the good behaviour, ought not to do any thing which shall be cause of breach of peace, or to put the people in fear, dread, or trouble; and so shall be intended of all things which concern the peace: but not in misdoing of other things, which touch not the peace. Yet a diversity was observed, between a breach of the peace, and a breach of the good behaviour; for the peace is not broken without an affray or battery, but the good behaviour may be forfeited by the number of people a man has, and by their harness, or weapons, and the like, altho' they break not the peace. 2 *H. 7. 2.*

7. The second instance, and upon which much stress hath been laid, was in the 13th year of the same king. In trespass of assault, battery, and imprisonment at *D.* the defendant saith, that one *Alice B.* had a house in the same town, and kept there suspicious people, to wit, of common bawdry, and that the plaintiff oftentimes resorted to the same house suspiciously, with women of bad fame and name, whereby the constable of the same town required the defendant to aid him to arrest the plaintiff, to find surety of his good behaviour: whereby the defendant came with the said constable at the hour of 12 in the night, and him found suspiciously in the same place; whereupon he took him, and put him in ward: and it was holden by all the justices to be a good justification; for they said, that it is lawful for every constable to take suspected persons, which wake in the night, and sleep in the day, or that keep suspicious company. 13 *H. 7. 10.*

8. In the next place, Sir *Anthony Fitzherbert*, who lived in the reign of king *Henry 8.* saith, that it seemeth that one justice may, by the commission, issue a warrant against a person to find surety of the good behaviour, by his discretion, as well as two justices may; and the words of the statute of the 34 *Ed. 3.* are to the same effect: otherwise, he says, damage may happen to some of the king's subjects, if the party be not attached, before that two justices have made the precept; yet (he says) the common usage is, to make such precept of the good behaviour in the name of two justices, and it is good to observe this direction. *Fitz. 7. Crom. 122.*

9. In the next place, it is proper to take notice of a case adjudged in the court of king's bench, in the 30th of *Q. Eliz.* reported by *L. Coke, 4 Inst. 181.* which was thus: at a sessions at _____ in the county of _____ one *William King* with sureties was bound by recognizance to appear at the next general sessions of the peace in the same county, and in the

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mean time to be of the good behaviour towards the queen and all her people. And after, at the next sessions, *William King* appeared, and was indicted for slanderous words spoken since his binding, to wit, for saying at one time to *Edward Kyrton*, esquire, *Thou art a peltex, thou art a liar, and hast told my lord lies.* And he was further indicted, that since the said recognizance, *the close of one John Wich with force and arms he broke and entred, and the cattle of the said John depasturing in the said close unlawfully vexed and chased.* And afterwards at another time he said to the said *Kyrton*, *thou art a drunken knave.* Which indictment was removed into the king's bench. And hereupon it was debated divers times both at the bar and the bench, whether admitting all that is contained in the indictment to be true, any thing therein was in judgment of law a breach of the said recognizance. And it was resolved, that neither any of the words, nor the trespass, were any breach of the good behaviour, for that none of them did tend immediately to the breach of the peace; for though the said words, *thou art a liar, thou art a drunken knave*, are provocations, yet they tend not immediately to the breach of the peace; as if *William King* had challenged *Kyrton* to fight with him, or had threatened to beat or wound him, or the like; these tend immediately to the breach of the peace, and are therefore breaches of the recognizance of the good behaviour. And this diversity (lord *Coke* says) was justly collected upon the coherence and context of the statute of the 34 *Ed. 3.* whereby justices are assigned for keeping of the peace, and to restrain the offenders, rioters, and all other barators, and to chastise them according to their trespass and offence; and to inquire of pillers and robbers in the parts beyond the seas, and be now come again, and go wandering and will not labour: and thus much for the punishment of offences against the peace after they be done. Then followeth an expresse authority given to the justices, for prevention of such offences before they be done, namely, *and to take of all them that be not of good fame* (that is, that be defamed and justly suspected that they intend to break the peace) *where they shall be found, sufficient surety and mainprize of their good behaviour towards the king and his people* (which must concern the king's peace, as is also provided by the words subsequent) *to the intent that the people be not by such rioters troubled or endamaged, nor the peace blemished, nor merchants nor other passing by the highways disturbed, nor put in the peril that may happen of such offenders.* And as for the trespass; although every wrongful trespass is by force and arms, and against the peace, yet these are not taken to be such as shall make a breach of the good behaviour.

10. After this, Mr. *Lambard*, who wrote towards the beginning of the reign of king *James 1.* saith thus: surety of the good abearing is of great affinity with that of the peace: as being provided for preservation of the peace, as that other is; for in the commission of the peace, they are both conveyed under one tract of speech, against such as threaten to hurt mens bodies, or fire their houses: which things (he says) are now commonly prevented by surety of the peace only.

And in the 2 *H. 7. 2.* (above recited) the surety of the good abearing is set forth to rest in this point chiefly, that a man do nothing that may be cause of a breach of the peace; and that it doth not consist in the observation of things that concern not the peace; and that it should differ from surety of

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of the peace in this, that where the peace is not broken without an affray, or battery, or such like, this surety may be broken by the number of a man's company, or by his or their weapons or harness.

And herewithal (he says) do also agree certain precedents in the king's bench.

But all this, notwithstanding, he thinks that a man may reasonably affirm, that the surety of good abearing should not be restrained to so narrow bounds.

In proof of which, he proceeds to comment on the above-mentioned statute of the 34 *Ed. 3.* enabling the keepers of the peace to *take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good abearing, towards the king and his people:* so that if a man be defamed, he may by virtue hereof, be bound to his good behaviour at the discretion of the justices. Now the doubt resteth in this; to understand concerning what matters this defamation must be: and this (he thinks) may be partly gathered out of the said statute; for after it hath first given power to the wardens of the peace to arrest and chastise offenders (that is to say, against the peace, rioters, and barators) then it willeth them to *inquire of such as having been robbers beyond the sea, were come over hitber, and would not labour as they were wont;* and lastly; it authorizeth them, *to take surety of the good behaviour of such as be defamed,* namely, for any of those former offences; for so it standeth well together that they should both punish such as have already so offended, and shall also provide, that others shall not likewise offend.

But he says, the further this bond of the good abearing doth extend, the more regard there ought to be taken in the awarding of it; and therefore (says he) although the justices have power to grant it, either by their own discretion or upon the complaint of others, even as they may that of the peace, yet I wish rather, that they do not command it but only upon sufficient cause seen to themselves, or upon the complaint of other very honest and creditable persons.

And then being about to set forth the form of a warrant, and of a recognizance for the good behaviour, he says, — And here, forasmuch as one justice alone, and out of sessions, may both by the first clause of the commission, and also by the opinion of *Fitzherbert*, grant this surety of the good abearing (altho' the common practice be, that two such justices do join in that doing, whereof also *Fitzherbert* hath very good liking) I will not stick to set forth the common forms as well of the precept as of the recognizance for the same, wherein if I shall use the names of two justices, you must take that to be done according to the common fashion, and not of any necessity in law. For as I would more gladly use the assistance of a fellow justice in this behalf, if I may conveniently have it; so if that may not be gotten, I would not greatly fear, when good cause shall require, to undertake the thing myself alone.

And besides this, he says, you may see admitted by the opinion of the court, 13 *H. 7.* that if a man in the night season haunt a house that is suspected for bawdry, or use suspicious company, then may the constable arrest him to find surety for his good abearing; for bawdry is not merely a spiritual offence, but mixed, and sounding somewhat against the peace of the land.

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And therefore (says he) it shall not be amiss at this day, in my slender opinion, to grant surety of the good abearing, against him that is suspected to have begotten a bastard child, to the end that he may be forthcoming when it shall be born; for otherwise there will be no putative father found, when the justices shall after the birth come to take order for his punishment. *Lamb. 115, 119.*

11. In the next place, Mr. *Pulton*, who lived about the same time with Mr. *Lambard*, writeth thus; the surety of the good abearing is ordained for the preservation of the peace, and it doth differ in nothing from that of the peace, but that there is more difficulty in the performance of it, and the party bound may sooner slide into the peril and danger of it. The surety of good abearing is most commonly granted in open sessions, or by two or three justices; or, upon a *supplicavit*, and great cause shewed and proved, it is granted in the chancery or king's bench. And though one justice alone may grant it if he will, yet it is seldom done so, unless it be to prevent some great, sudden, and imminent enormity or danger. The surety of the peace is most times taken at the request of one for the preservation of the peace chiefly against one. But the surety of the good abearing is oftentimes granted at the suit of divers, and those must be men of credit, and to provide for the safety of many; for the effect and purport thereof is, that the party bound shall demean himself well in his port, behaviour, and company, and do nothing that may be the cause of breach of the peace, or in putting the people in fear or trouble; and it is chiefly granted against common barators, common rioters, common quarrellers, common peace breakers, and persons greatly defamed for resorting to houses suspected to maintain incontinency or adultery, and against those that be generally feared to be robbers or spoilers of the king's people, or which do endamage, disturb, trouble, or put in peril passengers by the way. *Pult. 18.*

12. Afterwards Mr. *Dalton*, who wrote towards the latter end of king *James* the first his reign, says, the surety of the good behaviour is of great affinity with that of the peace, and is provided chiefly for the preservation of the peace; and that it is most commonly granted either in the open sessions, or by two or three justices out of sessions. Yet by the words of the commission, as also by the common opinion of the learned, one justice alone, out of sessions, may grant this surety of the good behaviour. But this is not usual, unless it be to prevent some great and sudden danger, especially against a man that is of any good estate, carriage, or report. And it shall be good discretion in the justices, that they do not grant it, but either upon sufficient cause seen to themselves, or upon the suit or complaint of others, and the same very honest and credible persons. *Dalt. c. 123.*

13. In the next place Mr. *Hawkins*, who wrote in the reign of king *George* the first, saith thus: there seem to have been some opinions, that the statute, speaking of those that be *not of good fame*, means only such as are defamed, and justly suspected, that they intend to break the peace, and that it doth not any way extend to those who are guilty of other misbehaviours not relating to the peace. But this seems much too narrow a construction; since the abovementioned expression of persons of *evil fame*, in common understanding, as properly includes persons of scandalous behaviour in other

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other respects, as those who by their quarrelsome behaviour give just suspicion of their readiness to break the peace; and accordingly it seems always to have been the better opinion, that a man may be bound to his good behaviour for many causes of scandal, which give him a bad fame, as being contrary to good manners only; as for haunting bawdy houses with women of bad fame; or for keeping bad women in his own house; or for speaking words of contempt of an inferior magistrate, as a justice of the peace, or mayor, tho' he be not then in the actual execution of his office; or of an inferior officer of justice, as a constable, and such like, being in the actual execution of his office.

However it seems the better opinion, that no one ought to be bound to the good behaviour, for any rash, quarrelsome or unmannerly words, unless they either directly tend to a breach of the peace, or to scandalize the government, by abusing those who are intrusted by it with the administration of justice, or to deter an officer from doing his duty: and therefore it seems, that he who barely calls another rogue, or rascal, or teller of lies, or drunkard, ought not for such cause to be bound to the good behaviour.

However, says he, I cannot find any certain precise rules, for the direction of the magistrate in this respect; and therefore am inclined to think, that he has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous; as of those who sleep in the day, and go abroad in the night; and of such as keep suspicious company; and of such as are generally suspected to be robbers, and the like; and of eves droppers; and common drunkards; and all other persons, whose misbehaviour may reasonably be intended to bring them within the meaning of the statute, as persons of evil fame, who, being described by an expression of so great latitude, seem in a great measure to be left to the judgment of the magistrate. But if he commit one for want of sureties, he must shew the cause with convenient certainty.

1 Haw. 132.

14 And thus the sense of the statute hath been extended, not only to offences immediately relating to the peace, but to divers misbehaviours not directly tending to a breach of the peace; insomuch as it becomes difficult to define how far it shall extend, and where it shall stop.

Mr. *Dalton*, in order to determine the same with some kind of certainty, hath (notwithstanding his opinion as abovementioned) inserted a number of instances, wherein sureties of the good behaviour may be granted; and they are these that follow:

- (1) Against rioters.
- (2) Barators.
- (3) Common quarrellers and common breakers of the peace.
- (4) Such as lie in wait to rob, or shall be suspected to lie in wait to rob, or shall assault, or attempt to rob another, or shall put passengers in fear or peril; or shall be generally suspected to be robbers by the highway.
- (5) Such as are like to commit murder, homicide, or other grievances, to any of the king's subjects in their bodies.

(6) Such

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(6) Such as shall practise to poison another : one instance of which may be the poisoning their food : thus Mr. *Dalton* granted the good behaviour against one who had bought ratsbane, and mingled it with corn, and then cast it amongst his neighbour's fowls, whereby most of them died.

(7) Such as in the presence or hearing of the justice, shall misbehave himself in some outrageous manner of force or fraud.

(8) Such as are greatly defamed for resorting to houses suspected to maintain adultery, or incontinency.

(9) Maintainers of houses commonly suspected to be houses of common bawdry.

(10) Common whoremongers and common whores, for bawdry is an offence temporal as well as spiritual, and is against the peace of the land.

(11) Night-walkers, that shall eves-drop mens houses, or shall cast mens gates, carts, or the like, into ponds, or commit other outrages or misdemeanors in the night, or shall be suspected to be pilferers, or otherwise like to disturb the peace, or that be persons of ill behaviour, or of evil fame or report generally, or that shall keep company with any such, or with any other suspicious person in the night.

(12) Suspected persons who live idly, and yet fare well, or are well apparelled, having nothing whereon to live ; unless upon examination they shall give a good account of such their living.

(13) Common gamesters, especially if they have not whereon to live.

(14) Such as raise hue and cry without cause.

(15) Libellers.

(16) Putative father of a bastard child.

(17) Such as persuade or procure the putative father to run away, or the mother to be conveyed away, whereby she leaveth her child to the charge of the town.

(18) Such as abuse a justice's warrant, or shall abuse him or the constable in executing their office. Nay, it seemeth (he says) that he who shall use words of contempt, or contrary to good manners, against a justice of the peace, though it be not at such a time as he is executing his office, yet he shall be bound to his good behaviour.

(19) Such as charge another before a justice with felony, riot, or forcible entry, and yet will not prosecute or give evidence.

(20) In general, whatsoever act or thing is of itself a misbehaviour, is cause sufficient to bind such an offender to the good behaviour. *Dalt.*

c. 124.

To which others have added other instances. As,

(21) Forcible entry. 1 *Haw.* 124.

(22) Mr. *Hawkins* says, that he hath heard it agreed in the court of king's bench, that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law ; yet it seems, he says, that the author may be bound to his good behaviour, as a scandalous person of evil fame. 1 *Haw.* 195.

(23) A man did beat a woman in *Westminster-hall*, and he was bound to the good behaviour ; and so (says Mr. *Crompton*) he may be bound to the peace or good behaviour, where he striketh a person in the presence of the justices in sessions. *Crom.* 124.

(24) A

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(24) A man was bound to the good behaviour by the court of king's bench, for assaulting and threatening a person so, that he could not attend the court in suit there, without great cost. And so it seemeth that it may be done, where one cometh to the sessions about a traverse to be tried there, or to prefer a bill of indictment, if he be assaulted or threatened. *Crom.* 125.

15. I have omitted to make any remarks in the progress of these authorities, being willing to exhibit them together in one view; I proceed now to take notice of such observations as do occur upon the whole.

First, It appears from hence, that the universal practice of one justice binding to the good behaviour, is but of a modern date; altho' the law for it is the same now, that it was near 400 years ago: and that it was a long time doubted, whether one justice alone could require sureties of the good behaviour. But here a distinction ought to be made, between the power given by the commission of the peace, and the power given by the above-mentioned statute: as to the commission, there seemeth to be no foundation for any doubt, but that thereby one justice alone may require such sureties; for the words are express, *we have assigned you, jointly and severally, and every one of you*; but then that extends only to two instances, namely, to *the threatening of a person concerning his body, or the firing of his house*. As to the statute, the doubt seems to have arisen upon this; in that having appointed who shall be assigned for justices, it then directeth, that *they shall have power to restrain offenders*; and it is holden, as Mr. Lambard hath observed, that if no power be expressly given by any statute to any one justice alone, he cannot otherwise compel the observation thereof, than by the help of his fellow justices. And Mr. Hawkins speaking hereof in the case of riots, says, that if one justice alone, proceeding upon this statute, shall arrest *an innocent person*, as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing of himself; because no one single justice is by this statute made a judge of the said offence: yet, nevertheless, he says, by a favourable construction which this statute hath received for the advancement of justice, it hath been resolved, that any one justice, upon this statute, *if he finds the persons riotously assembled*, may, without staying for his companions, arrest the offenders, and bind them to their good behaviour.

Secondly, It seemeth from what has been rehearsed, that the words, *not of good fame*, were generally understood for a long time, to refer to such offences only as have a relation to the peace, and not to other things which concern not the peace.

Thirdly, That one great in-let to the larger, and at length almost unlimited interpretation of the words, was the case abovementioned 13 H. 7. wherein it was adjudged to be lawful to arrest a man for the good behaviour, for frequenting a suspected bawdy house, with women of bad fame. And this is the reason which Mr. Dalton gives for many of his instances above specified, namely, that they are more properly against the peace, than this same case of avowtry.

Fourthly, That when once the gap was opened for the admission of other offences not immediately relating to the peace, they flowed in and multiplied. Thus, in the case of bastardy, having some affinity with the other of frequenting

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requenting bawdy houses, Mr. *Lambard* thought, that with equal reason, the reputed father of a bastard child might be bound to the good behaviour; and in a few years after, Mr. *Dalton* delivers it absolutely, that he may be so bound.

Fifthly, That therefore the natural and received sense of any statute ought not to be departed from without extreme necessity; for that one concession will make way for another, and the latter will plead for the same right of admission as the former.

Sixthly, That notwithstanding the aforesaid instances given by Mr *Dalton* and others, it may not be safe in all cases to rely upon every one of them without distinction; not only because it is almost impossible for any two cases to be exactly alike in all their circumstances, but also because in fact divers of them at different times have been adjudged otherwise, and others have not prevailed without much difficulty and contradiction in the courts above, and perhaps were at length admitted rather from the conveniency and reasonableness of the thing itself, and from an indulgence usually allowed to those gentlemen who serve their country without gain, and oftentimes with much trouble, than from any clear, positive, and express power given to them by the commission, or by the said statute.

Seventhly, That notwithstanding all which hath been said, perhaps the case before recited, concerning the frequenting of a suspected bawdy house, will not wholly support the weight which so many authors have laid upon it. For the question, whether a justice of the peace had cognizance of the offence, by virtue of the commission of the peace, or of the statute of the 34 *Ed. 3.* was no part of the dispute; for it was an arrest by the constable *ex officio*, as a conservator of the peace at common law, and without any warrant from a magistrate: and the question was not, whether the constable might require sureties for the good behaviour, as a thing different from sureties for the peace, but whether in that case he could arrest at all or not.

And if the authority of this case shall be abated, several of the above-mentioned instances will abate in proportion.

Eighthly, It is to be observed, that others of the abovesaid instances, were established upon matters originally determined in the court of king's bench, and Mr. *Crompton* himself doth refer to the authority and practice of that court in several instances. *Crom. 120.* But it doth by no means follow from what the justices of the court of king's bench may do, that justices of the peace may do the like; for their authority is circumscribed and limited by their commission and the statute law.

Ninthly, That it will perhaps abate some other of the foregoing instances, if we attend to this consideration; that there is a great difference between what the justices in sessions may do, after conviction by a jury, for an offence committed, and what a single justice out of the sessions may do, before an offence is committed, and to prevent the same from being committed; or what a single justice may do, upon a summary conviction before him, for an offence, as directed by some special act of parliament. The truth is, binding to the good behaviour was a discretionary judgment at the common law, given by a court of record, for an offence at the suit of the king, after a common law conviction by verdict of twelve men. Trial by his peers

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peers is the *Englishman's* birthright by the great charter, and cannot be taken away but by an authority equal to that which established it, that is by act of parliament; and therefore where an act gives a summary conviction before a justice of the peace, and inflicts a punishment upon such conviction, such statute must be pursued both as to the conviction and punishment. And it seemeth incongruous, that a justice of the peace shall have power to bind a man to the good behaviour, for an offence which he himself hath no power to hear and determine; for that is, in effect, giving judgment, and awarding execution, when it doth not, and cannot legally appear to him, that the person is guilty.

Tenthly, That therefore upon the whole it may be proper to conclude, that the magistrate in this article of the good behaviour, cannot exercise too much caution and good advisement; that in matters which the law hath left indefinite, it is better to fall short of, than to exceed his commission and authority; that to bind a man to the good behaviour upon the statute for *evil fame* in general, may not always be with safety; not only because upon an action brought it may be hard to prove such evil fame, but also because in fact it is not always true, for many a good man hath been evil spoken of: that altho' in some cases, a justice of the peace may have a *discretionary* power (as Mr. *Hawkins* expresseth it) yet he must remember withal, that it is a *legal* discretion, as Mr. *Barlow* terms it, in which, in favour of liberty great tenderness is to be used; or, as lord *Coke* hath defined it, discretion is a knowledge or understanding to discern between truth and falshood, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to our wills and private affections; and such discretion ought to be limited and bounded with the rules of reason, law, and justice. 5 Co. 100. 10 Co. 140.

II. For what it shall be forfeited.

1. This hath been handled in part as it fell in with the former section: and agreeably to the doctrine there laid down, Mr. *Dalton* says, that he who is bound to the good behaviour ought to demean himself well in his carriage and in his company, not doing any thing which shall be a cause of breach of the peace, or to put the people in fear, dread, or trouble; and so shall be intended of all things which concern the peace, but not in misdoing of other things which touch not the peace. *Dalt. c. 122.*

2. And Mr. *Hawkins* saith, It hath been laid down as a general rule, that whatever will be a good cause to bind a man to his good behaviour, will forfeit a recognizance for it; but this hath since been denied, and indeed seems by no means to be maintainable, because the statute in ordering persons of evil fame to be bound in this manner, seems in many places chiefly to regard the prevention of that mischief which they may justly be suspected to be likely to do; and in that respect requires them to secure the publick from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them.

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them or not; and it would be extremely hard in such cases to make persons forfeit their recognizance, who yet may justly be compellable to give one, as those who keep suspicious company, or those who spend much money idly, without having any visible means of getting it honestly, or those who lie under a general suspicion of being rogues, and the like. 1 Haw. 132, 133.

3. However it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited; but also for some others, for which such a recognizance cannot be forfeited; as for going armed with great numbers, to the terror of the people, or speaking words tending to sedition; and also for all such actual misbehaviours which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion of what perhaps may never actually happen. 1 Haw. 133.

Warrant for the peace, or good behaviour, in the king's majesty's name.

Dublin. **G**EORGE the third, by the grace of god, of Great Britain, France, and Ireland, king, defender of the faith, and so forth: to our sheriff of the county of ——— to the constable of the hundred of ——— in the said county, to the petty constables of the town of ——— in the said county, and to all and singular our bailiffs and other ministers in the said county, as well within liberties as without, greeting:

Forasmuch as A. I. of ——— in the said county, yeoman, hath personally come before Sir G—— D—— baronet, one of our justices assigned to keep the peace within the said county, and hath taken a corporal oath, that he the said A. I. is afraid that A. O. of ——— in the said county, yeoman, will beat, [wound, maim, or kill] him the said A. I. and hath therewithal prayed surety of the peace against him the said A. O. [or, if for the good behaviour ——— hath taken a corporal oath, that A. O. of ——— in the said county, yeoman, hath threatened to beat him the said A. I. or to burn the house of him the said A. I. and hath therewithal prayed surety of the good behaviour against him the said A. O.] Therefore we command and charge you, jointly and severally, that immediately upon the receipt hereof you bring the said A. O. before the said Sir G—— D—— to find sufficient surety and mainprise, as well for his personal appearance at the next general quarter-sessions of our peace, to be holden at ——— or elsewhere, in and for the said county, as also for our peace in the mean time to be kept towards us and all our liege people, and chiefly towards the said A. I. that is to say, that he the said A. O. shall not do, nor by any means procure or cause to be done, any of the said evils, to any of our said people, and especially to the said A. I. [Or, if for the good behaviour ——— as also for his good behaviour in the mean time, towards us and all our liege people, especially towards him the said A. I. Witness the said Sir G—— D—— at ——— in the said county, the ——— day of ——— in the ——— year of our reign.

If the justice shall think fit that he shall be carried immediately to gaol, for default of sureties, without being brought before him, or any other justice, this clause may be inserted, viz. — and especially towards him the said A. I. And if he the said A. O. shall refuse so to do, that then immediately, without expecting any further warrant, you him safely convey, or cause to be safely conveyed, to our common gaol in the said county, (or, to the house of correction at — in the said county), there to remain until he shall willingly do the same: so that he may before our said justices at the said next general quarter-sessions of our peace, then and there to answer unto us for his contempt in this behalf. And see that you certify your doings in the premisses, to our said justices at the said sessions, bringing then thither this precept with you.

Warrant for the peace, or good behaviour, in the name of the justice himself.

Dublin. **S**IR W—— F—— baronet, one of the justices of our lord the king assigned to keep the peace within the said county, To the sheriff of the said county, to the high constable of — in the said county, to the petty constables of — in the said county, and to all other the ministers and officers of our said lord the king, within the said county, and to every of them, greeting.

Forasmuch as A. I. of — in the said county, yeoman, hath personally come before me, and hath taken a corporal oath, that he the said A. I. is afraid that A. O. of — in the said county, yeoman, will beat him (wound, maim, kill, or do to him some bodily hurt) and hath therefore prayed surety of the peace against him the said A. O. [Or, if for the good behaviour. That A. O. of — in the said county, yeoman, hath threatened to do some bodily hurt to him the said A. I. or, to burn the house of him the said A. I. and hath therefore prayed surety of the good behaviour against him the said A. O.] These are therefore on the behalf, and in the name of our said lord the king, to command you jointly and severally, that immediately upon the receipt hereof you bring the said A. O. before me, to find surety as well for his personal appearance at the next general quarter-sessions of the peace, to be holden at — in — in and for the said county, as also for his keeping the peace [Or, for his being of the good behaviour] in the mean time towards the king and all his liege people, and chiefly towards the said A. I. Given under my seal at — in the said county, the — day of — in the — year of the reign of our said lord George the third, of Great Britain, France, and Ireland, king.

Or the warrant may be directed to any of these officers abovenamed, particularly; or to any other indifferent person or persons, as followeth:

Another warrant for the peace, or good behaviour.

Dublin. { To the constables of the town of ——— in the said
 { county, and to either of them.

FORASMUCH as A. I. the wife of B. I. of your said town, labourer, hath required sureties of the peace [or, of the good behaviour] before me D—— W——, esquire, one of the justices of our lord the king assigned to keep the peace within the said county, against A. O. of your said town, butcher, and withal hath taken her corporal oath before me, that she requireth the same not for any private malice, hatred, or evil will, but simply that she is afraid, that he the said A. O. will do to her some bodily mischief [or, as the case shall be: and if it be for the good behaviour, then add, ——— and that he the said A. O. hath threatened to do some bodily mischief to her the said A. I. or to burn her houses] These are therefore in the name of our said lord the king to charge and command you, that immediately upon sight hereof, you or one of you do bring the said A. O. before me to find sufficient sureties as well for his personal appearance at the next general quarter-sessions of the peace to be holden in and for the said county, as also that he the said A. O. shall in the mean time keep the peace, [or, be of the good behaviour] as well towards our said lord the king, as towards all his liege people, and especially towards the said A. I. Dated at ——— in the said county, the ——— day of ——— in the ——— year of the reign of our said lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth.

Another warrant for the peace, or good behaviour.

Dublin. { To the constable of ——— in the said county

FORASMUCH as A. I. of ——— aforesaid in the county aforesaid, yeoman, hath personally come before me T—— S——, esquire, one of the justices of our lord the king assigned to keep the peace within the said county, and hath taken his corporal oath, that A. O. of ——— aforesaid in the county, aforesaid, yeoman, hath assaulted, beaten, and wounded him the said A. I. and further hath threatened him concerning his body, insomuch, that he the said A. I. is afraid that the said A. O. will beat, wound, maim, or kill him the said A. I. or do to him some other bodily harm; and thereupon he the said A. I. hath prayed security of the peace, [or, of the good behaviour] to be had or granted to him against the said A. O. These are therefore to require you in the name of our said lord the king, immediately upon the sight hereof, to bring the said A. O. before me, to find sufficient sureties for his
personal

personal appearance at the next general quarter-sessions of the peace to be holden in and for the said county, then and there to answer the premisses, and in the mean time that he the said A. O. keep the peace, [or, shall be of the good behaviour,] towards our said lord the king, and all his liege people, and especially towards the said A. I. Given under my hand and seal at— in — in the said county, the — day of — in the — year of the reign of our said lord George the third, of Great Britain, France, and Ireland, king.

Note; The warrants above set forth, so far as they concern the good behaviour, are framed upon the clause in the commission, empowering one justice to bind to the good behaviour certain offenders therein mentioned. The following warrant for the good behaviour simply, as contradistinguished from the peace, is formed on the statute of the 34 Ed. 3. so often abovementioned.

Warrant for the good behaviour; on the 34 Ed. 3. c. 1. from Lambard and Dalton.

Dublin. **W** — — — — W — — — —, esquire, and R — — — — H — — — —, esquire, justices of our lord the king, assigned to keep the peace within the said county. To the sheriff of the said county, to the constable of the hundred of — — in the said county, to the petty constables of the town of — — in the said county, and to all and singular the bailiffs, constables, and other officers of our said lord the king, as well within liberties as without, in the same county, greeting.

Forasmuch as we are given to understand, by the information, testimony, and complaint of many credible persons, that A. O. of — — in the county aforesaid, gentleman, and B. O. of the same, yeoman, are not of good name and fame, nor of honest conversation, but evil doers, rioters, barators, and disturbers of the peace of our said lord the king, so that murder, homicide, strifes, discords and other grievances and damages amongst the lieges of our said lord the king concerning their bodies are likely to arise thereby; Therefore on the behalf of our said lord the king, we command you, and every of you, that you omit not by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach the aforesaid A. O. and B. O. so that you have them before us or others our fellows, justices of our said lord the king, assigned to keep the peace within the county aforesaid, as soon as they can be taken [or, before the justices of our said lord the king, assigned to keep the peace within the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter-sessions of the peace to be holden in and for the said county] to find then before us (or the said justices) sufficient surety and mainprise for their good behaviour towards our said lord the king, and all his people, according to the form of the statute in such case made and provided. And this you shall in no wise omit, on the peril that shall ensue thereon. And have you

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you before us, or before the said justices [at the sessions aforesaid] this precept. Given under our seals at——in the county aforesaid, the——day of——in the——year of the reign of our said lord——.

Recognizance for the peace or good behaviour.

— **B**E it remembered, that on the——day of——in the——year of the reign of our lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, A. O. of——in the county aforesaid, yeoman, A. S. of the same place, yeoman, and B. S. of the same place, yeoman, came before me T. C. esquire, one of the justices of our said lord the king, assigned to keep the peace within the said county, and acknowledged themselves to owe to our said lord the king, to wit, the said A. O. the sum of 20l. and the said A. S. the sum of 10l. and the said B. S. the sum of 10l. of good and lawful money of Great Britain, to be respectively made and levied of their several goods and chattels, lands, and tenements, to the use of our said lord the king, his heirs and successors, if be the said A. O. shall fail in performing the condition indorsed [or, underwritten].

Acknowledged before me

T. C.

The condition of this recognizance is such, that if the within bounden [or, above bounden] A. O. shall personally appear at the next general quarter sessions of the peace, to be holden in and for the county aforesaid, to do and receive what shall then and there be enjoined him by the court, and in the mean time shall keep the peace, [or, be of the good behaviour, or, shall keep the peace and be of the good behaviour] towards the king and all his liege people, and especially towards A. I. of——in the said county, yeoman; Then the said recognizance shall be void, or else remain in its force.

Mittimus for want of sureties.

— { To the constable of——and to the keeper of——in the said county.

WHEREAS A. O. of——in the said county, yeoman, is now brought before me J. D. esquire, one of the justices of our lord the king, assigned to keep the peace in and for the said county, requiring him to find sufficient sureties to be bound with him in a recognizance for his personal appearance at the next general quarter sessions of the peace, to be holden in and for the said county, and in the mean time to keep the peace [or, be of the good behaviour] towards our said lord the king, and all his liege people, and especially towards A. I. of——in the said county, yeoman; and whereas he the said A. O. hath refused and doth now refuse before me to find such sureties: These are therefore in the name of our said lord the king, to command you the said constable, forthwith to convey the said A. O. to the common gaol of our said lord the king, [or, to the house of correction] at——in the said county,

ty, and to deliver him to the keeper thereof there, together with this precept: And I do, in the name of our said lord the king, hereby command you the said keeper, to receive the said A. O. into your custody in the said gaol [or, house of correction] and him there safely to keep, until he shall find such sureties as aforesaid. Given under my hand and seal, at——in the said county, the——day of——in the——year of the reign of our said lord George the third, of Great Britain, France, and Ireland, king.

The form of a supersedeas.

—R. W. esquire, one of the justices of our lord the king, assigned to keep the peace within the county aforesaid, To the sheriff, bailiff, constables, and other the faithful ministers and subjects of our said lord the king within the said county, and to every of them, greeting.

Forasmuch as A. O. of——in the said county, yeoman, hath personally come before me at——in the said county, and hath found sufficient surety, that is to say, A. S. of——yeoman, and B. S. of——yeoman, either of the which hath undertaken for the said A. O. under the pain of 20l. and he the said A. O. hath undertaken for himself under the pain of 40l. that he the said A. O. shall personally appear at the next general quarter sessions of the peace to be holden in and for the said county, then and there to do and receive what shall be enjoined him by the said court, and in the mean time shall well and truly keep the peace [or, be of the good behaviour] towards our said lord the king, and all his liege people, and especially towards A. I. of——yeoman: Therefore on behalf of our said lord the king I do command you, and every of you, that you utterly forbear and surcease to arrest, take, imprison, or otherwise by any means for the said cause to molest the said A. O. and if you have for the said occasion, and for none other, taken and imprisoned him the said A. O. that then him you deliver, or cause to be delivered and set at liberty, without further delay. Given at——aforesaid, in the county aforesaid, under my seal, this——day of——in the——year of the reign of——.

This supersedeas may be also in the name of the king, under the teste of the justice, thus;

GEORGE the third, by the grace of God, &c. To the sheriff, &c. greeting: Forasmuch as A. O. hath come before E. W. esquire, one of our justices assigned to keep the peace within our said county, and hath found, &c. We therefore command you, and every of you, that ye forbear, &c. Witness the said E. W. at——in the county aforesaid, the——day of——in the——year of our reign.

Release of the surety for the peace, or good behaviour.

—B E it remembered, that on the——day of——in the——year of——the aforesaid A. I. hath come before me the said F. F. esquire, and freely remised and released, as much as in him lieth, the aforesaid security of the peace [or, of the good behaviour] by him prayed before me against

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against the above-named A. O. In witness whereof, I the said F. F. have bereunto set my seal. Given, &c.

This is to be written under the recognizance; and if the justice only sign, without sealing it, it is well enough, especially where the recognizance is without seal.

Or, the release may be by itself, thus :

— **B**E it remembered, that A. I. of — in the said county, yeoman, on the — day of — in the — year of the reign of — came before me W. T. esquire, one of the justices of our lord the king, assigned to keep the peace within the said county, at — in the said county, and there remised and freely released to A. O. of — in the said county, yeoman, the surety of the peace [or, good behaviour] by him the said A. I. before me prayed against the said A. O. Given, &c.

Or, if it is before another justice, then say, — the surety of the peace [or, good behaviour] which he has against A. O. of — in the said county, yeoman. Given, &c.

But note; That none of these releases will discharge the recognizance, or the appearance of the party bound thereby; but that he must appear according to the condition of the recognizance, for the safeguard of his recognizance.

Liberate to discharge one committed for want of sureties.

— **S**. N. esquire, one of the justices of our lord the king, assigned to keep the peace in the county aforesaid. To the keeper of his majesty's gaol at — in the said county, greeting.

Forasmuch as A. O. in the prison of our said lord the king, in your custody now being, at the suit of A. I. of — in the said county, yeoman, for the want of his finding sufficient sureties for his personal appearance at the next general quarter sessions of the peace, to be holden in and for the said county, and for his keeping the peace [or, being of the good behaviour] in the mean time, towards our said lord the king, and all his liege people, and especially towards the said A. I. hath found before me sufficient sureties, to wit, A. S. of — yeoman, and B. S. of — yeoman, either of which hath undertaken for the said A. O. under the pain of 20l. and he the said A. O. hath undertaken for himself under the pain of 40l. that he the said A. O. shall and will personally appear at the next general quarter sessions of the peace to be holden in and for the said county, and shall well and truly keep the peace [or, be of the good behaviour] in the mean time, towards our said lord the king, and all his liege people, and especially towards the said A. I. Therefore on the behalf of our said lord the king I do command you, that if the said A. O. do remain in the said gaol, for the said cause, and for none other, then you forbear to grieve or detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will fall thereon. Given under my seal — in

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— in the said county, the — day of — in the — year of the
reign of our said lord George the third, of Great Britain, France, and Ire-
land, king.

Swearing.

BY the canons of the church, If any offend their brethren by swear-
ing, the churchwardens shall present them; and such notorious of-
fenders shall not be admitted to the holy communion, till they be reformed.

Punishment in
the spiritual
court.

Can. 61.

By the act 10 & 11 Car. 1. cap. 1. No person shall profanely swear or
curse, and if any person shall offend herein, either in the hearing of a justice
of peace, or of any mayor or head officer of a city or town corporate, where
such offence is committed, or shall thereof be convicted by the oath of two
witnesses, or confession of the party before such justice, &c. such offender
shall, for every time, forfeit to the poor of that parish 12 *d.* and it shall be
lawful for the constable, churchwardens, and overseers of the poor, to levy
the money by distress and sale of goods. *s. 1.*

And in defect of distress, the offender, if above the age of twelve years,
shall, by warrant from such justice, &c. be set in the stocks three hours;
but if the offender be under twelve years, and shall not pay the sum, he or
she, by warrant of such justice, &c. shall be whipped by the constable, or
by the parent or master in his presence.

If any such offender shall commence any suit for such distraining, &c. the
defendants may plead the general issue. *s. 2.*

Provided, that every offence against this law be complained of and prov-
ed within twenty days after the offence, and this act shall be read in every
parish church by the minister upon *Sunday*, after evening prayer, twice in
the year. *s. 3.*

And by the 7 Will. 3. cap. 9. If any person shall profanely swear and
curse in the presence or hearing of any justice of peace, or of the mayor or
other head officer for any city or town corporate, where such offence shall be
committed, or shall be thereof convicted by the oath of one witness, or by
the confession of the party, before any justice, mayor, or bailiff, or other
chief officer, where the said offence shall be committed, for every such of-
fence, the party offending shall forfeit to the use of the poor of the parish
where such offence shall be committed, the respective sums herein after men-
tioned, that is to say, every servant, day labourer, common soldier, and
common seaman, one shilling, and every other person, two shillings; and in
case any of the persons aforesaid, shall, after conviction, offend a second
time, such persons shall forfeit double; and if a third time, treble the sum
to be paid for the first offence. *s. 1.*

Upon neglect of payment, any justice of peace, &c. shall send his war-
rant to the constable, tithing-man, churchwarden, or overseer of the poor
of the parish where the offence shall be committed, or the offender inhabit,
commanding them to levy by distress and sale of goods, the sum forfeited;
and in case no distress can be had, such offender, being above the age of
sixteen years, shall, by warrant of the justice, &c. be set in the stocks one
hour,

Sweating.

hour, for every single offence, and for any number of offences, whereof he shall be convicted at one time, two hours. *f. 2.*

And if the party offending be under the age of sixteen years, and shall not pay the forfeitures, he shall, by warrant, be whipped by the constable, or by the parent, guardian, or master of such offender, in presence of the constable.

If any justice of peace or chief magistrate shall wilfully omit the execution of this act, he shall forfeit five pounds, one moiety to the informer, to be recovered by action, &c. in any of his majesty's courts at *Dublin*. *f. 3.*

If any action shall be brought for doing any thing in pursuance of this act, the defendant may plead the general issue, and shall have treble costs. *f. 4.*

No person shall be troubled for any offence against this statute, unless the same be proved or prosecuted within ten days after the offence. *f. 5.*

This act shall be read four times in the year, in all parish churches and public chapels, by the parson or curate after morning prayer, under pain of twenty shillings for every omission. *f. 6.*

The justices of peace, &c. shall register all the convictions made before him upon this act, and shall certify the same to the next quarter sessions, to be kept upon record by the clerks of the peace, to be seen without fee. *f. 7.*

Information.

Dublin. **T**HE information of A. I. of——— in the county aforesaid, yeoman, made on oath this——— day of——— in the——— year of the reign of——— before me J. P. esquire, one of his majesty's justices of the peace for the said county: *Who saith,*

That on——— the——— day of——— now last past, at——— in the parish of——— in the county aforesaid, he heard A. O. of——— in the said county, yeoman, swear one profane oath [or, curse one profane curse] in these words, to wit, &c.

Summons.

Dublin. { To the constable of———.

WHEREAS information hath this day been made before me J. P. esquire, one of his majesty's justices of the peace for the said county, upon the oath of A. I. of——— yeoman, that on——— the——— day of this present month of——— he heard A. O. of——— in the said county, yeoman, at——— in the parish of——— in the said county, swear one profane oath [or, curse one profane curse] These are therefore to command you to cause the said A. O. forthwith to appear before me to answer the premisses, and to be further dealt with according to law. Given under my hand and seal at——— in the said county, the——— day of——— in the——— year of———.

The

The conviction may be in the words and form following;

BE it remembered, that on the——day of——in the——year of his majesty's reign, A. B. was convicted before me (one of his majesty's justices of the peace for the county, riding, division, or liberty aforesaid; or before me——mayor of the city or town of——within the county of——) of swearing one or more profane oath or oaths, or of cursing one or more profane curse or curses. Given under my hand and seal the day and year aforesaid.

Tiles.

EVERY person using the occupation of making tile, shall make it good, seasonable, and sufficient, and well whited and anealed. And the earth whereof it shall be made, shall be digged and cast up before the first of *November*, and stirred and turned before the first of *February*, and not wrought before the first of *March*; and before it be put to making of tile, shall be truly wrought and tried from stones; and the veins called malin or marle, and chalk, shall be severed from the earth whereof the tile is made: And plain tile shall be 10½ inches long, 6½ broad, and half an inch and half a quarter thick; roof tile or cress tile, 13 inches long, half an inch and half a quarter thick, with convenient deepness; gutter tile and cover tile, 10½ inches long, with convenient thickness, breadth, and deepness. And if any person set to sale any tile made contrary to this ordinance, he shall forfeit to the buyer double value, and make fine and ransom at the king's will. And every person that feeleth himself grieved, and will sue, may have an action of debt against the offender. And the plaintiff in every such action may recover his costs. And the justices of the peace, and every of them, may hear and determine by their discretions, as well by the examination as otherwise, offences against this ordinance, as well at the king's suit, as the party's who shall be grieved. And if it appear to the justices, or any of them, that any person hath offended herein, then the same justices shall assess upon the offender no less fine than for every 1000 of plain tile 5 s. for every 100 of roof tile 6 s. 8 d. for every 100 of corner tile or gutter tile 2 s. And the said justices may call before them persons having knowledge in making of tile, to search and examine the digging, turning, parting, making, whiting, and anealing. And no person shall put to sale any tile before it be searched, on pain of forfeiting the same. And if the searchers find any defaulters, they shall present them at the next sessions; which presentment shall be as effectual as that of 12 men. And the searcher shall have of the tile maker for his labour, for every 1000 plain tile searched 1 d. for every 100 roof tile an half penny, and for every 100 of corner tile and gutter tile a farthing. Searcher making default, shall forfeit 10 s. to the king: And the justices may hear and determine the defaults of the searchers, in like manner as of the tile makers. 17 Ed. 4. c. 4.

- I. Of small tithes and other church rates and payments.
- II. Punishing combinations.
- III. Of contempts for tithes in the spiritual court.

I. Of small tithes due from any person.

[Note; tithes, with regard to their several *kinds* or *natures*, are divided into *prædial*, *mixt*, and *personal*. *Prædial* tithes are such as arise merely and immediately from the ground; as grain of all sorts, hay, wood, fruits, herbs; for a piece of land or ground being called in Latin *prædium* (whether it be arable, meadow, or pasture) the fruit or produce thereof is called *prædial*, and consequently the tithe payable for such annual produce, is called a *prædial* tithe. *Mixt* tithes are those which arise not immediately from the ground, but from things immediately nourished by the ground, as by means of goods depastured thereupon, or otherwise nourished with the fruits thereof; as colts, calves, lambs, chickens, milk, cheese, eggs. *Personal* tithes are such profits as do arise by the honest labour and industry of man, employing himself in some personal work, artifice, or negotiation; being the tenth part of the clear gain, after charges deducted.—Tithes, with regard to *value*, are divided into *great* and *small*. *Great* tithes, are chiefly corn, hay, and wood. *Small* tithes, are the *prædial* tithes of other kinds, together with those which are called *mixt*, and *personal*.—*Offerings*, *oblations*, and *obventions*, are the customary payments for communicants at *Easter*, for marriages, christenings, churching of women, burials, and such like.]

1. **B**Y the act 1 G. 2. c. 12. All tithes where the same do not amount to above the yearly value of forty shillings from any one person, and all the compositions and agreements for the same, with all offerings, and other ecclesiastical dues of like value, shall be truly set out and paid to the several rectors, vicars, and other persons to whom they shall be payable, in their several parishes, according to the rates, customs, and prescriptions, commonly used within the said parishes respectively. *s. 1.*

2. If any person shall subtract or fail in the payment of such tithes, offerings, ecclesiastical dues, or compositions, twenty days after demand thereof, it shall be lawful for the persons to whom the same shall be due, to make their complaint in writing unto two justices of the peace, where the same shall grow due. *s. 2.*

H. 6 G. K. and Furness. Order for non-payment of small tithes was quashed, because said only *upon complaint* generally, and the statute requires the complaint to be *in writing*. *Str. 264.*

3. Where such complaint shall be brought, the said justices are required to summon in writing under their hands and seals, by giving four days notice at the least, to such persons against whom any complaint shall be made as aforesaid; and after their appearance, or upon default, the summons being

ng proved before them upon oath, the said justices shall proceed to determine the said complaint; and upon the proof produced before them, shall, in writing under their hands and seals, adjudge the case, and give such compensation for such tithes, offerings, ecclesiastical dues, or compositions, so subtracted or with-held, as they shall judge to be reasonable, and costs not exceeding ten shillings. *f. 3.*

4. No justice shall have authority to determine any of the matters aforesaid, who shall not have estate of freehold within this kingdom, of the yearly value of one hundred pounds, except the justices of the peace in counties of cities or towns, who may proceed in the execution of this statute as aforesaid, within their respective jurisdictions, notwithstanding such justices shall not have such estate of freehold. *f. 4.*

5. No justice of the peace shall be qualified to determine any of the matters aforesaid, who shall not be resident in the county, county of a city or town where the tithes, &c. in question shall arise, or who shall be patron of the church or chapel, in right of which the said tithes, &c. shall be demanded, or who shall be any ways interested in such tithes, &c. or who shall be a clergyman in holy orders. *f. 5.*

6. If any person shall refuse or neglect, by the space of ten days after notice given to pay such sum of money, as upon such complaint and proceeding, shall by two justices be adjudged as aforesaid, the constables and churchwardens of the said parish, or one of them, shall, by warrant under the hands and seals of the said justices, distrain the goods of the party. *f. 6.*

And after detaining them three days, in case the sum adjudged, with reasonable charges for making and detaining the distress, be not tendered or paid by the party in the mean time, shall make public sale of the same, and pay to the party complaining, so much of the money arising by such sale, as may satisfy the sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress, as the said justices shall think fit, and shall render the overplus, if any be, to the owner.

7. It shall be lawful for all justices of the peace, in the examination of matters, whereof jurisdiction is given to them by this act, to administer oaths to any witnesses where the same shall be necessary for their information, and for the better discovery of the truth. *f. 7.*

8. No complaint concerning any such tithes, offerings, or other ecclesiastical dues or compositions, shall be determined by any justices, by virtue of this act, unless the complaint shall be made within two years after the same become due. *f. 8.*

9. Any persons aggrieved by any judgment to be given by two justices, may appeal to the next quarter sessions to be held for that county, county of a city or town, and the justices there present, or the major part of them, shall proceed finally to determine the matter, and to reverse the judgment if they shall see cause. *f. 9.*

And if the justices then present, or the major part of them, shall find cause to confirm the judgment given by the two first justices, they shall decree the same by order of sessions, and shall also give such costs against the appellant, to be levied by distress and sale of goods, &c. as to them shall seem reasonable; and no proceedings or judgment to be had by virtue of this

this act, shall be removed or superseded by any *certiorari* or other writ, unless the title of such tithes or other ecclesiastical dues shall be in question.

10. Where any persons complained of for subtracting or with-holding any such tithes or other dues, shall, before the justices to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby they ought to be freed from payment of the said tithes, or other dues in question, and deliver the same in writing to the justices, subscribed by them, and shall then give to the party complaining sufficient security, to the satisfaction of the justices, to pay all such costs and damages, as upon a trial at law in any of his majesty's courts, having cognizance of that matter, shall be given against them in case the said prescription, composition, or *modus decimandi*, shall not, upon the trial, be allowed, the said justices shall forbear to give any judgment in the matter; and the persons complaining, shall be at liberty to prosecute such persons for the said subtraction, in any other court where they might have sued before the making of this act. *f. 10.*

11. Every person who shall, by virtue of this act, obtain any judgment, or against whom any judgment shall be obtained before justices of the peace out of sessions, for such tithes or other ecclesiastical dues or compositions, may cause the said judgment to be inrolled at the next quarter sessions, to be holden for the said county, county of a city or town. *f. 11.*

And the clerk of the peace is required, upon tender thereof, to inrol the same, and he shall not ask or receive for the inrollment of any one judgment, any fee exceeding one shilling.

And the judgment so inrolled, and satisfaction made by paying the sum so adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said tithes or other ecclesiastical dues or compositions, for which the said judgment was obtained.

12. If any person, against whom any such judgment shall be had, shall remove out of the county after judgment had, and before the levying the sums thereby adjudged, the justices who made the said judgment, or one of them, shall certify the same under their hands and seals, to any justice of the peace of such other county or place wherein the said persons shall be inhabitants. *f. 12.*

Which justice is required by warrant to be directed to the constables or churchwardens of the place, or one of them, to levy the sums so adjudged, upon the goods of such persons, as the other justices might have done, if they had not removed.

13. The justices who shall determine any matters aforesaid, shall have power to give costs not exceeding ten shillings to the party prosecuted, if they shall find the complaint to be false and vexatious, which costs shall be levied in manner aforesaid. *f. 13.*

14. If any person shall be sued for any thing done in execution of this act, and the plaintiff in such suit shall discontinue his action, or be nonsuit, or a verdict pass against him, such persons shall recover double costs. *f. 14.*

15. Any clerk or other person who shall begin any suit for recovery of such tithes, or other ecclesiastical dues, not exceeding the value of forty shillings, in his majesty's court of exchequer, or in any the ecclesiastical courts,

courts, shall have no benefit by this act for the same matter for which they have so sued. *f. 15.*

This act is continued, subject to the provisos mentioned in stat. 5 Geo. 2. cap. 6. for eleven years from the 25th of March, 1764, and to the end of then next session of parliament, by stat. 3 G. 3. c. 16. f. 2.

16. And by the 5 Geo. 2. cap. 6. Such distress as shall be taken by virtue of the act 1 Geo. 2. cap. 12. shall be of such goods of the party as shall be nearest to the value of the sum awarded by the judgment, and can conveniently be found or taken at the time of taking such distress; and if sale thereof shall be made, it shall be upon the oath of sworn appraisers, to be nominated by the justices.

No person who shall make such complaint, and shall have had a hearing, and judgment shall have been given thereon, as by the said act is directed, shall for the same matter for which they have so complained, commence any suit in his majesty's court of exchequer, or in any ecclesiastical court.

Where the value of the tithes or other ecclesiastical dues demanded by any person, does not exceed five shillings, one justice of the peace qualified as the said act directs, shall have power to determine all controversies concerning the same, in such manner as two justices may determine such controversies by the said act.

This act (so far as it relates to the recovery of tithes, &c. of small value) is continued for eleven years from the 25th of March, 1764, and to the end of the then next session of parliament by stat. 3 G. 3. c. 16. f. 2.

II. Punishing combinations.

By the act 29 G. 2. c. 12. All bonds, contracts, covenants, or agreements made, or to be made or entered into, by or between any parishioners for the purpose of hindering or obstructing any rector, vicar, lay-impropriator, or tithe-farmer, in drawing any tithes, or setting or selling any tithes to the best advantage, are hereby declared to be illegal, null, and void. *f. 1.*

If any person shall make or enter into any such bond, covenant, contract, or agreement, as aforesaid; or shall knowingly write, or send, or cause, or procure to be written or sent, any letter without a name subscribed thereto, or signed with a fictitious name; or knowingly shall publish, or cause to be published, or shall set up, or cause to be set up, in any place, any written or printed advertisement or paper, thereby threatening any violence, injury, or damage to the person, or to the estate or property of any rector, vicar, lay-impropriator, or tithe-farmer, or of any tenant or parishioner, with an intention to terrify any rector, vicar, lay-impropriator, or tithe-farmer, from taking any tithe in kind, or from setting or selling any tithe to the best advantage; or with an intention to terrify any persons from assisting such rector, vicar, lay-impropriator, or tithe-farmer, in drawing, setting, or selling any tithe; with an intention to procure or encourage any unlawful combination of parishioners, to hinder or obstruct any rector, vicar, lay-impro-

impropriator, or tithe-farmer, in drawing any tithes, or in setting or selling any tithes to the best advantage. *s. 2.*

Or if any persons shall wilfully or maliciously destroy, or make unfit for use, any carriage, cart, truckle, or car, or the harness, traces, or other tackle belonging thereto, designed or intended to be employed in drawing or carrying any tithes.

Every person so offending, being lawfully convicted, upon the oath of one credible witness, before any two justices of the peace for the county, city, town, or place where such offence shall be committed, upon any information or prosecution exhibited or commenced within three calendar months after the offence committed (which oaths the said justices are hereby empowered and required to administer) shall forfeit five pounds, *sterl.* one half thereof to be given to the informer, and the other half to the poor of the parish in which such offence shall be committed.

Which said sum of five pounds, the said justices are required to levy by issuing their warrants under their hands and seals, for distress and sale of the offenders goods and chattles, returning the overplus to the owner; and for want of sufficient distress, such offender shall, by the order of such justices, at their discretion, be committed, either to the house of correction, there to remain, and be kept at hard labour, or to the common gaol of such county, &c. there to remain without bail or mainprize, for any time not exceeding three calendar months.

(This act is made perpetual by st. 1 G. 3. c. 17. s. 15.)

III. Of contempts for tithes in the spiritual court.

By the *Eng. stat. 27 H. 8. c. 20.* Every subject of this realm, *Ireland and Wales*, according to the ecclesiastical laws and ordinances of this church of *England*, and after the laudable uses and customs of the parish, or other place where he dwelleth or occupieth, shall pay his tithes, offerings, and other duties of holy church. *s. 1.*

And for subtractions of any of the said tithes or duties, the parson, vicar, curate, or other party grieved, may by process of the king's ecclesiastical laws of the church of *Ireland*, convent the person offending before his ordinary, or other competent judge, having authority to hear and determine the right of tithes, and also to compel the person offending to yield their said duties.

Contempt of
process.

And in case the ordinary or his commissary, or the archdeacon or his official, or any other competent judge, for any contempt, contumacy, disobedience, or other misdemeanor of the defendant, make information and request to any of the king's most honourable council, or to the justices of the peace of the shire where such offender dwelleth, to assist the ordinary or judge to order or reform such person in any cause before rehearsed; the king's said honourable council, or such two justices of peace, whereof one to be of the *quorum*, shall have power to cause to be attached, the person against whom such information shall be made, and to commit the same person to ward, till he shall have found surety before the king's counsellor or justice of peace, to the use of the king, to give due obedience to the process, decrees,

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decrees, and sentences of the ecclesiastical court, wherein such suit shall depend.

And the king's said counsellors or two justices of the peace shall have power to take and record recognizances and obligations in any cause above written.

Provided, that every party to any such suit may have his lawful action, demand, or prosecution, appeals, prohibitions, and all other lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm. *f. 2.*

And by the 33 *H. 8. ff. 1. c. 12.* If any persons, after sentence definitive given against them, obstinately refuse to pay their tithes or duties, or such sums of money so adjudged, wherein they be condemned for the same, two justices of the peace of the same shire, whereof one to be of the *quorum*, shall have authority, upon information, certificate, or complaint to them made in writing, by the ecclesiastical judge that gave sentence, to cause the party so refusing, to be attached and committed to the next gaol, till they shall have found sufficient sureties, to be bound by recognizance, or otherwise, to the king to perform the sentence.

But by the 3 *G. 3. c. 25.* For the future, no such attachment or commitment shall be made by such justices of the peace.

This act shall continue in force for two years from the 24th day of June, 1764, and to the end of the then next session of parliament.

Complaint for tithes.

TO J. P. and K. P. esquires, two of his majesty's justices of the peace in and for the county of——A. I. of——in the said county, clerk, humbly complaineth,

That he the said complainant did by the space of 20 days and upwards before the day of the date hereof, demand of A. O. of——in the parish of——in the county aforesaid, yeoman, the small tithes, offerings, oblations, and obventions, justly become due within two years now last past, from him the said A. O. unto him the said complainant, to the value of 40s. and that he the said A. O. did upon the said demand refuse, and doth yet refuse, to pay and compound for, and hath not paid nor compounded for the same, or any part thereof: The said complainant therefore prayeth such redress in the premisses, as to you shall seem meet, and as to the law doth appertain. Signed the——day of——in the——year of——.

Summons for tithes.

Dublin. { To the constable of——.

WHEREAS complaint in writing hath been made unto us——two of his majesty's justices of the peace for the said county, by A. I. of——in the said county, clerk, that A. O. of——in the parish of——

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in the said county, yeoman, hath for above the space of 20 days before the time of the said complaint so made unto us as aforesaid, refused to compound for, or to pay unto him the said A. I. and hath not yet compounded for, nor paid, the small tithes, offerings, oblations, and obventions, justly due from him the said A. O. to him the said A. I. These are therefore to command you forthwith, upon sight hereof, to summon the said A. O. to appear before us at the house of _____ in _____ in the said county, on _____ the _____ day of this present month of _____ at the hour of _____ in the forenoon of the same day, to answer unto the said complaint. And be you then there to certify what you shall have done in the premisses. Given under our hands and seals at _____ in the said county, the _____ day of _____ in the _____ year of _____.

Order for payment of tithes.

_____ **W**HEREAS complaint in writing hath been made unto us _____ two of his majesty's justices of the peace for the said county, by A. I. vicar of the parish of _____ in the said county, that A. O. of _____ in the said parish of _____ in the county aforesaid, yeoman, did refuse for the space of 20 days next before the time of the said complaint so made unto us as aforesaid, to pay or compound for his small tithes, offerings, oblations, and obventions, arising in the said parish of _____ and due to him the said A. I. We therefore the said justices, being neither of us patron of the parish church of _____ aforesaid, nor any ways interested in any of the said tithes, offerings, oblations, or obventions, having duly summoned the said A. O. before us, and having duly examined the truth and justice of the said complaint upon oath, do find that there is justly due from the said A. O. to the said A. I. the sum of 40s. being the value of the said tithes, offerings, oblations, and obventions, become due within two years last past; and do therefore adjudge and order the aforesaid A. O. to pay or cause to be paid unto the said A. I. the aforesaid sum of 4l. and also the sum of 10s. for the costs and charges of the said A. I. in prosecuting the said A. O. for the recovery of his said just dues. Given under our hands and seals at _____ in the said county, the _____ day of _____ in the _____ year of the reign of _____.

Distress for tithes.

_____ { To the constable of _____ in the said county, and to the churchwardens of the parish of _____ in the said county, and to every of them.

WHEREAS upon the complaint in writing of A. I. vicar of the parish of _____ aforesaid, in the county aforesaid, A. O. of _____ in the said parish, in the county aforesaid, yeoman, hath been duly summoned to appear before us _____ two of his majesty's justices of the peace for the said county, to be examined for the non-payment of the small tithes, offerings, oblations, and obventions, due unto the said A. I. And whereas we the said justices, being neither of us patron of the parish church of _____ aforesaid, nor any way interested in any of the said tithes, offerings, oblations, or obventions, have

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have duly examined the truth and justice of the said complaint, and have ordered him the said A. O. to pay unto the said A. I. the sum of 40s. being the value of the tithes, offerings, oblations, and obventions, become due from him the said A. O. to him the said A. I. within two years next before the said complaint so made unto us as aforesaid, together with the sum of 10s. for the costs and charges of the said A. I. for the recovery of his said just dues; making in the whole the sum of 2l. 10s. And whereas it appeareth unto us the said justices, that the said A. O. had due notice of our said order for the space of ten days and upwards before the day of the date hereof, but hath refused to pay, and hath not yet paid the sum of 2l. 10s. nor any part thereof: These are therefore to command you, jointly and severally, that you, or some or one of you, do forthwith distrain the goods and chattles of the said A. O. and in case the said sum of 2l. 10s. together with your reasonable charges of making and detaining the said distress, be not paid, or tendered to be paid by him the said A. O. in [four] days next after such distress made, that then you do make publick sale of the said goods and chattels so distrained as aforesaid, and out of the money arising from such sale, that you pay or cause to be paid unto him the said A. I. the said sum of 2l. 10s. and thereout also deduct and detain your reasonable charges of making, keeping, and selling the said distress; and if any overplus shall remain, after such payment and deduction as aforesaid, that then you do render the same unto him the said A. O. upon demand. Given under our hands and seals at _____ in the said county, the _____ day of _____ in the _____ year _____.

Tobacco.

BY the *Eng. stat.* 12 C. 2. c. 34. s. 1. No person shall set, plant, improve to grow, make or cure any tobacco, either in seed, plant, or otherwise, within *England, Wales, Guernsey or Jersey, or Berwick, or in Ireland*, under the penalty of forfeiture of such tobacco, or the value thereof, or of 40s. for every pole of ground so planted, &c. one moiety to his majesty, and the other moiety to him that shall sue for the same in any court of record.

All sheriffs, justices of peace, mayors, bailiffs and constables, upon information made that there is any tobacco sett or growing within their precincts, shall within ten days cause to be burnt, plucked up or destroyed all such tobacco.

In case any shall resist any persons in the execution of this act, such person shall forfeit 5l. in manner aforesaid. And in case any person shall not pay the money, distress shall be made and sale, and in case no distress be found, such party shall be committed to the common gaol in the county for two months.

But nothing herein shall hinder planting the same in gardens for physick or chirurgery, so as the quantity planted exceed not half a pole of ground.

s. 4.

NO toll shall be demanded or received by any body politic or corporate, or other persons, for any cattle, goods or merchandises that shall be droven or carried into or through any place where the same shall not be sold, consumed or slaughtered. *St. 4 Ann. c. 8. s. 1.*

Provided, that where any persons or bodies politic, heretofore lawfully could demand or take toll for cattle or other goods, driven or carried over any bridge, in respect of such persons or body politic being obliged at their own charges, and not at the charges of any county, &c. to keep such bridges in repair, such persons or body politic may take such reasonable toll for such cattle or goods driven or carried over such bridges, as they might have done by law before the passing of this act. *s. 2.*

Where any cattle shall remain unsold at any fair or market, it shall be lawful for the owners or drivers thereof to carry away such cattle as shall remain unsold without paying any toll whatsoever for the same. *s. 3.*

In case any body politic or corporate, or other persons, shall presume to demand or collect any toll contrary to this act, every such offender shall forfeit for the first offence ten shillings, to be demanded before a justice of the peace, within six days after such offence committed. *s. 4.*

And for the second and every other offence after conviction, five pounds, to be demanded also within the time aforesaid, one moiety thereof to the party injured, and the other moiety to the use of the poor of the parish wherein such offence shall be committed, to be recovered by distress and sale of the offenders goods, on conviction before any justice of the peace of the county wherein such offence shall be committed, by confession of the party offending, or by oath of two credible witnesses, to be taken before such justice;

And in case any justice to whom such complaints shall be made, shall refuse or wilfully neglect to put this act in execution, every such justice shall for every such neglect or refusal forfeit twenty pounds, the one moiety thereof to be to her majesty, and the other moiety to the party grieved; to be recovered by bill or information in any court of record.

Persons who shall drive or carry away cattle, goods or merchandise into any city, borough, or town corporate, and shall there refuse to pay the accustomed toll, under pretence that such cattle, goods or merchandises are only to be droven through, and shall after sell or dispose of any part of such cattle, goods or merchandises in such city, borough, or town corporate, shall for the first offence forfeit ten shillings, being duly convicted thereof before any one justice of the peace or chief magistrate of such city, town, or borough wherein such offence shall be committed; and for every other offence that shall be committed after such conviction, the party so offending shall forfeit five pounds, to be recovered and levied as aforesaid. *This act is made perpetual by 6 Ann. c. 12.*

And by the 31 G. 2. c. 9. All toll of any corn, grain, meal, and flour, shall be taken by weight, and not by measure; and any person who shall take or gather toll of any corn, grain, meal, or flour, otherwise than by weight, shall, for every such offence, forfeit five pounds, to be recovered upon due proof upon oath before the chief magistrate of the place, or justice of the peace of the county where the offence shall be committed, or by civil bill, at the assizes

assizes or quarter sessions of the county of *Dublin* (which oath such chief magistrate and justice of the peace are impowered to administer) and by warrant under their hands and seals, to levy the said forfeitures by sale of the goods and chattels of the person so offending, one moiety of which forfeiture shall go to the incorporated society for promoting *English* protestant schools in *Ireland*, and the other moiety to the informer. *f. 7.*

Also, by the *1 G. 3. c. 17.* No issue shall hereafter be tried by a jury of any city, in any action or suit concerning any tolls, duties or customs, claimed by the corporation of such city, but every such issue shall be tried by a jury of an indifferent county, to be appointed by the court in which such action or suit shall depend. *f. 13.*

The mayor, or other chief magistrate of every city and town corporate, shall cause a schedule of the duties, tolls, or customs, claimed by the corporation of such city or town corporate, to be hung up in some conspicuous part of the market-houses of such city or town corporate, on every market-day for one month next ensuing every *Michaelmas* day; and in case of neglect so to do, such mayor, or other chief magistrate, shall, for every such neglect, forfeit a penalty of ten pounds *sterling*, to be recovered in a summary way by civil bill at the next assizes, by any persons who shall sue for the same. *f. 29.*

If any officer of any corporation, farmer of tolls, or toll-gatherer, shall exact from, or compel any person to pay any duty, toll, custom, or perquisite, not mentioned or comprized in such schedule, to be hung up as aforesaid; such officer, farmer of tolls, or toll-gatherer, shall for every such offence forfeit five pounds, to be recovered by civil bill at the next assizes, by any person from whom any unlawful duty, toll, custom, or perquisite shall be so exacted. *f. 30.*

All turf, furze, and timber in faggots, for fuel, shall pass into and through every city and town, free from all toll, custom, or perquisite whatsoever, claimed by any officer or member of such city or town.

Torn.

THE sheriff's torn is the king's court of record, holden before the Torn, what. sheriff, for redressing of common grievances within the county. 2

Haw. 55.

2. And forasmuch as the sheriff did go in circuit twice every year, ^{Meaning of the word.} throughout every hundred within the county, it was called *tour*, or *tourn*, which signifieth a circuit or perambulation. 2 *Inst. 70.*

3. By the *31 Ed. 3. st. 1. c. 15.* The sheriff shall make his torn yearly, ^{When to be holden.} once within a month after *Easter*, and another time within a month after *Michaelmas*; and if he holds it in other manner, he shall lose his torn for the time; that is, the court so holden for that time shall be void, and the sheriff shall lose the profit thereof. 2 *Inst. 71.*

And he shall keep his torn no where but in due place and accustomed. 9 *H. 3. c. 35.*

Who are to
appear at the
torn.

4. Peers, clergymen, and tenants in antient demesne, are privileged from appearing at the torn. *52 H. 3. c. 10. 2 Haw. 57.*

Also they that have hundreds of their own shall not be bound to appear at the torn, but in the bailiwicks where they bedwelling. *52 H. 3. c. 10.*

But all other persons, being above the age of 12 years, are bound to attend at such courts, in order to make inquiry of all common grievances, and also to give security to the publick for their good behaviour, by taking an oath to be faithful to the king, and to observe his laws, and also by incorporating themselves into some free pledge or tithing which formerly signified a certain number of families living together in the same precinct, the masters whereof were every one of them mutually bound for each other, and punishable for the default of any member of any such family, in not appearing to answer for himself on any accusation made against him. *2 Haw. 55.*

Jurors in the
torn.

5. No bailiff, or other officer, shall return or impanel any person upon an inquisition in the torn, but such as be of good name and fame, and have 20 s. a year freehold within the shire, or 26 s. 8 d. customary or copyhold; on pain of 40 s. and the sheriff other 40 s. half to the king, and half to him that will sue; and an indictment otherwise taken shall be void. *1 R. 3. c. 4.*

But if the party except not to it upon his arraignment, he is concluded by that omission. *2 H. H. 70.*

And the jury shall put their seals to their inquisitions. *13 Ed. 1. c. 13.*

Indictment to
be indented.

6. And indictments in the torn shall be by roll indented, one part to remain with the indictors, and the other with him that taketh the inquest.

1 Ed. 3. c. 17.

Distress and
sale.

7. It seems to be settled at this day, that a distress is incident of common right to every fine and amercement in the torn; and that the offender's goods may be distrained in any lands within the precinct of the court, or in the highway; and that the goods distrained may be sold. But the bailiff must have a special warrant to make distress. *2 Haw. 60, 61.*

Or the fine may be recovered by action of debt. *2 Haw. 61.*

Within what
time offences
are cognizable
in the torn.
Traverse.

8. But no offence is cognizable in the torn, unless it arise since the holding of the last court. *2 Haw. 66.*

9. It seems to be agreed, that a presentment in the torn, of any offence within the jurisdiction of the court; being neither capital, nor concerning any freehold, subjects the party to a fine or amercement, without any traverse. *2 Haw. 71.*

Indictment to
be certified to
the sessions.

10. By the *magna charta, c. 17.* The sheriff is restrained in his torn, from hearing and determining indictments of felonies; yet the sheriffs did commonly make out process or precepts in nature of *capias* to arrest the parties; but by the *1 Ed. 4. c. 2.* their power of making out process upon these indictments is taken away, as well in cases of indictments of felony as other misdemeanors within their cognizance, but they are to deliver all such indictments and presentments to the next sessions, who are to make out process thereupon, and hear and determine them. *2 H. H. 71.*

And

And the estreats of the fines thereupon shall be inrolled, and by indenture be delivered to the sheriff, to the use of him that was sheriff at the time of the indictment so taken in the torn as aforesaid. 1 *Ed. 4. c. 2.*

II. The constables of common right are to be chosen and sworn in the torn or leet. 2 *Haw. 62.*

Constables
chosen in the
torn.

Transportation.

BY the act 6 *Geo. 1. cap. 12. sect. 1.* Where any offenders shall be convicted of any crimes for which by law they are to be excluded the benefit of clergy, and his majesty, or the chief governors of this kingdom shall be pleased to extend mercy to such offenders, on the condition of transportation to any part of *America*, it shall be lawful for the several judges of assize, judges of the king's-bench, commissioners of *oyer and terminer*, and the justices at the sessions to be holden for the county and county of the city of *Dublin*, to allow such offenders the benefit of a pardon, on the condition of transportation, and the several judges of assize, judges of the king's-bench, commissioners of *oyer and terminer*, and justices aforesaid, are required to order a warrant of transportation for all such offenders; and in case such offenders shall not be in the city of *Dublin*, or some seaport which trade to some of his majesty's plantations in *America*, such judges, commissioners, or justices, shall order the sheriffs of such counties or cities where such offenders are, to transmit without fee or reward such persons who may lie under such rule of transportation, to the next seaport which trade to some of his majesty's plantations in *America*, and there to be delivered by the said sheriffs to the magistrate or officer of such seaport, who is required to secure such persons till transportation can be had for them, the sheriffs of the counties where such offenders have been convicted, first giving security, which they are hereby required to give the sheriffs of such counties, to which such offenders shall be delivered in order to be transported, to reimburse such sums of money as shall be disbursed in giving the said allowance to the offenders aforesaid, which shall be afterwards levied by presentment of the grand jury on the body of the county in which such offenders have been convicted, and they to be maintained till transportation, at the publick charge of the counties or cities where such offenders were convicted, and to have such allowance as prisoners now have in the gaols of this kingdom.

For felonies
without bene-
fit of clergy.

And the magistrates or officers who shall have such offenders in their custody in order to transportation, are impowered to contract with any person for such transportation, and after such contract made, such offenders shall be transferred by the said magistrate or officer to such persons and their assigns to be by them transported, they entering into a recognizance of fifty pounds, the condition of which shall be that such offenders shall be transported.

The sheriffs who shall have such order of transmittal directed to them, shall at the next assizes or sessions to be holden for such county or city from whence such offenders were transmitted, lodge with the clerk of the crown or peace of such county or city, a certificate of his delivering such prisoners

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soners to the magistrate or officer of such seaport, as the said warrant of transmittal shall direct. *s. 2.*

For felonies
within clergy.

If any person shall commit any grand or petit larceny, or feloniously steal or take away money, goods, or chattles from the person or the house of any other, for which such offender is intitled to the benefit of clergy, it shall be lawful for the court before whom they were convicted, or any court held at the same place with the like authority, if they think fit, instead of ordering such offenders to be burnt in the hand or whipt, to order that such offenders shall be sent to such seaport in manner aforesaid, that they may be transported as soon as conveniently may be to some of his majesty's colonies in *America* for seven years. *s. 3.*

And that court before whom they were convicted, or any subsequent court held at the same place with the like authority as the former, shall have power to transfer such offenders by order of court to the use of any persons, who shall contract in manner aforesaid for the performance of such transportation, to them and their assigns for the term of seven years, to commence from the time of the offenders landing in *America*.

Returning from
transportation.

If any offenders so ordered to be transported for seven years, or other time as aforesaid, shall return into any part of this kingdom before the end of their said term, he or she shall be liable to be punished as any person attainted of felony without the benefit of clergy, and execution shall be awarded against such offenders accordingly. *s. 4.*

This act is continued by stat. 29 G. 2. cap. 8. sect. 2. for twenty one years, from the end of that session of parliament, and to the end of the then next session.

Being at large
after order or
agreement for
transportation.

And by the 8 Geo. 1. cap. 9. sect. 1. If any felons or vagabonds who shall be ordered to be transported, pursuant to any of the statutes now in force, shall afterwards break gaol, or be at large within any part of *Ireland*, without some lawful cause, before the expiration of the term for which felons or vagabonds shall be ordered to be transported, such persons being thereof convicted shall suffer death as in cases of felony, without benefit of clergy or of the statute 9 Ann. cap. 6.

Such offenders may be tried for the said offence in any county, and the clerk of the crown, and clerk of the peace where such orders of transportation shall be made, shall at the request of the prosecutor, or any other in his majesty's behalf, certify a brief abstract containing the tenor of every indictment and conviction, and of the order for transportation, to his majesty's justices of the king's-bench, or the justices of assize, oyer and terminer, or gaol delivery, or the justices of the peace at their quarter-sessions to be held for the county of *Dublin*, and county of the city of *Dublin*, where such man or woman shall be indicted or presented, not taking for the same above two shillings and six pence, which certificate shall be a sufficient proof that such person or persons have been before convicted as a felon, or presented as a vagabond respectively, and ordered to be transported. *s. 2.*

Also,

Transportation.

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Also, by the 12 Geo. 1. cap. 8. sect. 1. It shall be lawful for the chief magistrate of the city or port-town in which any person shall be confined under sentence of transportation, or in which any person shall be confined, who shall obtain any pardon with condition or order for transportation under the hand of the lord lieutenant or chief governors, although the time limited by such pardon, rule, or order be expired, and such chief magistrate is required to contract with any persons for the transportation of any of those who shall be so confined in such manner, and for such term of years as by an act 6 Geo. 1. cap. 12. is directed, so as the person contracting with such chief magistrate do enter into such recognizance as by the said act is appointed.

Contract for-
transportation.

Bond for trans-
portation.

It shall be lawful for the chief magistrate of such city or port-town, by warrant to require the sheriffs of such city being a county of it self, or of the county wherein such city or port-town shall lie, or their under-sheriffs, to pay unto the persons who shall contract for the transportation of any such person convicted of a capital felony, any sum not exceeding forty shillings, and for every other person which shall be ordered to be transported, any sum not exceeding twenty shillings, in which warrant shall be mentioned the name of the person to be transported, and the time or place where presented or convicted, and the offence of which he or she was convicted. §. 2.

Every sheriff to whom such warrant shall be directed, shall without fee pay the sum in such warrant contained, taking a receipt from the person so contracting, acknowledging the payment of such sums, and also acknowledging that he hath received the bodies of the persons to be transported. §. 3.

Upon producing of such warrant, together with such receipt, at any assizes or general quarter-sessions for the county where the persons in such warrant named were convicted or presented, the grand jury are required to present the sum contained in such warrant, which shall be apportioned and levied as other sums raised at assizes and sessions are usually levied and apportioned, and shall be repaid to such sheriff as shall have disbursed the same, or his executors or administrators, or to the persons by them appointed to receive the same. §. 4.

If any person so to be transported shall refuse to sign and seal any articles or indenture agreed upon between such chief magistrate of the city or port-town, and the person contracting for his or her transportation, so as the person to be transported be not by any such articles or indenture obliged to serve for any longer term than seven years, every such person, if convicted of a capital felony, shall be deprived of the benefit of clergy, and of this and the said former act, or any other act or order by virtue whereof he or she were to be transported, and shall be continued in, or be immediately transmitted to the gaol of the county where he or she was convicted, and sentence of death shall be pronounced against him or her in the next term in the king's bench, or at the next general quarter-sessions in the county of *Dublin*, or county of the city of *Dublin*, or at the next general gaol delivery in such other county where such person was convicted, and execution awarded accordingly. §. 5.

And if any other person who shall be ordered to be transported as aforesaid, shall refuse to sign and seal such agreement or indenture, every such person

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person shall be thrice publicly whipt through such city or port-town, and afterwards remain close confined in gaol till he or she be transported.

If any person who shall be transported as a felon convicted of a capital felony, shall at any time be found within this kingdom, not being licensed thereunto by his majesty under *the* privy seal, such person shall suffer death as a felon without benefit of clergy, and may be tried in any county where he shall be apprehended. *s. 6.*

If any persons under sentence of transportation shall be transmitted to any port-town within any county or county of a city, other than where such sentence or order was made, the chief magistrate of such port-town shall receive and commit such persons to gaol, who shall be there maintained in such manner as convict felons are maintained until they be transported. *s. 7.*

And the sheriffs who shall deliver over such persons to be transported shall give security to the sheriffs of such counties, or to such magistrate or other officer to whom such offenders shall be delivered in order to transportation, to reimburse all such money as shall be disbursed on account of persons so transmitted, for their maintenance in gaol to the time of their being transported; which sums shall be levied by presentments of the grand jury on the body of the county where such sentence of transportation was made, as the same is directed by the said act 6 *Geo. I. cap. 12.* in case of felons so transmitted for transportation.

The clerks of the crown and clerks of the peace shall make out, and sign certificates of the names of every person remaining in the gaols of the several counties under any rule of transportation, made in every term and at every assizes or general gaol delivery, or quarter-sessions of the peace, at which the said clerk of the crown or peace respectively officiated, specifying therein the particular offences for which such persons were respectively ordered to be transported. *s. 8.*

Which certificates shall within thirty days after the last day of every assizes, or gaol delivery, or quarter-sessions, by the several clerks of the crown and peace respectively, be lodged in the hands of *the* lord mayor of the city of *Dublin*, where such conviction or presentment was in his majesty's court of king's bench, or in any county in the province of *Leinster*, and in the hands of the mayor of *Cork*, the mayor of *Waterford*, and the mayor of *Limerick*, where such conviction or presentment was in any county in the province of *Munster*, and in the hands of the mayor of *Londonderry* and the sovereign of *Belfast*, where such conviction or presentment was in any county in the province of *Ulster*, and in the hands of the mayor of *Galway*, and the provost of *Sligo*, where such conviction or presentment was in any county in the province of *Connaught*.

Which several chief magistrates of the said cities and towns are required to cause lists of the names of the persons returned to them in such certificate to be posted up in the *Exchange*, and other most public places of their said respective cities and towns, together with the several rewards intended to be given for the transportation of the persons whose names are contained in such lists, and likewise to take care that such lists continue posted as aforesaid, until the persons in such lists named be actually transported.

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If it shall appear to the court of king's bench, or to the justices of assize or justices at the general quarter-sessions of the peace respectively, that the clerk of the crown of the said court of king's bench, or the clerk of the crown or clerk of the peace for the county for which such assizes or quarter-sessions are held respectively, hath neglected to return such certificate, the court of king's bench, and such justices of assize and justices of the peace in such quarter-sessions respectively, are required to impose on every such clerk of the crown and clerk of the peace, for every such neglect a fine not exceeding ten pounds, nor less than five pounds. *f. 9.*

Whenever his majesty, or the lord lieutenant, or chief governors, shall be pleased to extend mercy to any person who shall be convicted of felony, or who shall receive sentence of death for any felony, any order under the sign manual or under the hand of the lord lieutenant or chief governors, directing the person so convicted or sentenced to be transported, shall be as effectual as if a pardon for such felony with condition of transportation had been passed under the great seal, and pleaded and allowed. *f. 10.*

And such order shall be a sufficient warrant to all sheriffs, gaolers, and others, for the delivery of the person in such order named, to the sheriff or gaoler of the place from whence such felon is to be transported, or to the persons contracting for the transportation of such felon, so as such order be also counter-signed by the judges or one of them before whom such felon was tried; which order after such delivery of such felon shall be lodged in the hands of the clerk of the crown or clerk of the peace where such conviction was had, together with a receipt from the person to whom such felon was delivered to be transported, to be kept among the records of the court.

Nothing herein contained shall extend to inflict death on any person who shall receive his majesty's pardon upon condition of transportation for any limited time, or who shall be ordered by his majesty, the lord lieutenant or chief governors to be transported for any limited time, so as such person be not found in this kingdom before the time in such pardon or order limited be expired. *f. 11.*

This act is continued by st. 29 G. 2. c. 8. f. 2. for twenty one years, from the end of that session of parliament, and to the end of the then next session.

And also by 3 G. 2. c. 4. The grand juries at the several assizes, or in the king's bench, or on any commission of *oyer and terminer*, or at the general quarter-sessions of the peace for the county of *Dublin*, or county of the city of *Dublin*, may present any sum not exceeding six pounds for the effectual transportation of each person so convicted or presented, in which shall be included a sum not exceeding twenty shillings for transmittal of such persons so to be transported. *f. 5.*

Which sums when presented and levied, shall be paid by the treasurers of the respective counties where such persons shall be convicted or presented for transportation to the sheriffs of the respective counties.

And the sheriffs are directed upon such presentments being made forthwith, to transmit such offenders to one of the seaport towns or cities, where, by the law now in force, they are obliged to send them, where there are any

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ships ready to sail to any of his majesty's plantations in *America*, and to deliver over such offenders to the chief magistrate of such city or town, with the respective sums presented, after deducting so much as is allowed in the presentment for transmittal fees.

And the chief magistrate to whom such offenders are delivered, is to deliver over such offenders, with the several sums paid to him by the sheriffs, to such masters of ships who contract for the transportation of such offenders; and the chief magistrate is required to give a receipt for the money so paid, and for the offenders so delivered to him.

Where the grand juries have a power of recommending convict felons to mercy, and such felons are burnt in the hand and dismissed, such felons convict so recommended shall be either burned in the hand or transported to the plantations in the common manner, at the discretion of the court or judge before whom such offender shall be convicted. *s. 6.*

This act is also continued by the same act, 29 G. 2. c. 8. s. 2. for twenty one years from the end of that session of parliament, and to the end of the then next session.

And by the 17 G. 2. c. 4. If any masters of ships who shall undertake to transport felons or vagabonds who shall be ordered to be transported to any of his majesty's plantations in *America*, shall fraudulently land in any part of this kingdom or of *Europe*, any such felons or vagabonds undertaken by them to be transported, such persons so landing such felons or vagabonds, being thereof convicted upon indictment for the aforesaid offence, shall suffer death as in cases of felony without benefit of clergy.

All persons who shall contract pursuant to any of the acts for transporting felons, &c. for transporting felons or vagabonds, shall together with two solvent persons enter into a bond of recognizance, to be deposited with the sheriff or such persons with whom they shall contract, of the penalty of ten pounds for every felon and vagabond so contracted for, conditioned to receive such felons or vagabonds from the persons in whose custody they then shall be, and to convey them on board some ship then bound immediately for some part of his majesty's plantations beyond the seas, and to transport and land them in some part of the said plantations, unless prevented by the party's death, the casualties of the sea, or being taken by an enemy.

Which bonds or recognizances shall be respectively delivered and disposed of in such manner, and for such purposes as is directed by an act 2 Ann. c. 12. concerning bonds and recognizances, directed by the said act, to be entered into by persons desiring such convict felons as are for that purpose mentioned to be delivered to them.

The directions prescribed by st. 2 Ann. c. 12. relative to the disposal of such bonds, are as follow, viz. Which bond shall be delivered to the clerk of the peace of the county whence such prisoner was taken, within three months after the date thereof, to the end the grand jury at the quarter-sessions may inquire whether such prisoner was transported according to the tenor of the said bond; and if it be found he was not, then the said bond shall be immediately returned into the exchequer to be put in suit, and upon return of a certificate thereof from the governor or chief magistrate of the place where such person is so landed, of such

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such prisoners being landed beyond seas, the said bond shall be delivered up to be cancelled, to the party producing such certificate, without fee or reward.

Traverse.

1. **T**Raverse took its name from the *French de traverse*, which is ^{Traverse,} no other than *de transverso* in *Latin*, signifying, *on the other side*; ^{whence.} because as the indictment on the one side chargeth the party, so he on the other side cometh in to discharge himself. *Lamb. 540.*

2. To traverse an indictment then, is to take issue upon the chief matter ^{Traverse,} thereof; which is the same as if one shall say, *to make contradiction, or to deny* ^{what.} *the point of the indictment*: As in a presentment against a person for a highway overflowed with water, for default of scouring a ditch, which he, and they whose estate he hath in certain lands there, have used to scour or cleanse; such person may traverse either the matter, to wit, that there is no highway there, or that the ditch is sufficiently scoured; or otherwise he may traverse the cause, to wit, that he hath not that land, or that he and they whose estate he hath have not used to scour the ditch. *Lamb. 541.*

3. And forasmuch as in the record of one traverse, there is at once discovered, the style of the sessions, the indictment, the process to answer, the ^{Form of a} traverse itself, the verdict, and judgment thereupon, the process of execution, the yielding of the parties, and the assessment of their fines, so that it alone may serve instead of all, it is judged requisite to insert the same as follows:

— **H**ERETOFORE, to wit, at the sessions of the peace at ——— (Style of the
in the county aforesaid, on the ——— next before the feast of ^{sessions.)}
St. Matthew the apostle, in the ——— year of the reign of ——— by
the grace of God, of Great Britain, France, and Ireland, king, defender of the
faith, and so forth, before J. P. and K. P. esquires, and others their associates,
justices of our said lord the king, assigned to keep the peace in the county afore-
said, as also to hear and determine divers felonies, trespasses, and other misde-
meanors in the same county committed, by the oath of twelve jurors it is present- (The indict-
ed, that J. L. of ——— R. M. of ——— and T. L. of ——— with divers ^{ment})
others unknown, evil doers and disturbers of the peace of our said lord the king,
in a warlike manner arrayed, joined, and assembled, on the ——— day of ———
in the night of the same day, in the year aforesaid, with force and arms, to wit,
with swords, staves, clubs, guns, and other arms, as well offensive as defen-
sive, at ——— the close of one W. W. (called B.) unlawfully, riotously, and
routously broke and entered, and eight waggon loads of hay, to the value of ———
then and there being, of the goods and chattels of the said W. W. then and
there unjustly and unlawfully took and carried away, against the peace of our
said lord the king, and against the form of the statute in that case made and
provided: Whereupon it was commanded to the sheriff, that he should not omit, (Process to an-
&c. but cause them to come to answer. And afterwards, to wit, on the Tuesday ^{swer.)}
aforesaid next before the feast of St. Matthew the apostle, in the year aforesaid, (Traverse.)
before the aforesaid justices, came the aforesaid J. L. R. M. and T. L. in their
proper persons, and having had the bearing of the indictment aforesaid, sever-
rally

(Jury.)

(Day given.)

(Verdict.)

(Judgment.)

(Process of execution.)

(Fine assessed.)

rally say, that they are thereof not guilty, and of this they put themselves upon the country; and A. M. who for our lord the king in this behalf prosecutes, in like manner, &c. Therefore let there come thereupon a jury before the justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine, &c. at the sessions of the peace at ——— &c. on the Tuesday next after the Epiphany of our lord then next to be holden, And who, &c. To recognize, &c. Because as well, &c. The same day is given as well to the aforesaid A. M. who prosecutes, &c. as to the aforesaid J. L. R. M. and T. L. &c. To which sessions of the peace holden at W. aforesaid in the county aforesaid, on the aforesaid day, &c. before ——— and their associates, justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, came as well the aforesaid, A. M. who prosecutes, &c. as the aforesaid J. L. R. M. and T. L. in their proper persons. And the jurors aforesaid, by the sheriff of the county aforesaid for this impanelled, and demanded, to wit, A. B. C. D. &c. likewise did come, who to say the truth concerning the premisses being tried and sworn, say upon their oath, that the aforesaid J. L. R. M. and T. L. are guilty, and every of them is guilty, of the trespass, contempt, and riot aforesaid, in the indictment aforesaid above specified, in manner and form as against them is above supposed. Therefore it is considered by the court, that the aforesaid J. L. R. M. and T. L. be taken to satisfy our lord the king of their fines, by occasion of the trespass, contempt, and riot aforesaid. Which J. L. R. M. and T. L. then and there present in court, prayed that they to a fine with our said lord the king, by the occasion aforesaid, may be admitted; and thereof they put themselves severally upon the mercy of our lord the king. And the fine of the same J. L. by the justices aforesaid is assessed at 3l. 6s. 8d. and the fine of the same R. M. is assessed at 20s. and the fine of the same T. L. is assessed at 5l. of good and lawful money of Great Britain, to the use and behoof of our said lord the king. Lamb. 543.

Notice of trial.

4. Every defendant indicted for a misdemeanor, should give full eight days notice of trial to the prosecutor, before the assizes, if the trial is to be there, if at the sessions, it is usual to give two or three days notice. Cr. Circ. 20, 48.

Treason.

Meaning of the word treason.

1. TREASON, according to lord Coke, is derived from *trahir*, to betray; and *trahison*, by contraction *treason*, is the betraying itself. 3 Inst. 4.

Treason, generally spoken, is intended, not of petit treason, but of high treason only. 1 H. H. 316.

Power of justices of the peace therein.

2. Notwithstanding that treason and misprision of treason are not within the letter of the commission of the peace, yet inasmuch as they are against the peace of the king, and of the realm, any justice of the peace may, either upon his own knowledge, or the complaint of others, cause any person to be

be apprehended for any such offence. And such justice may take the examination of the person so apprehended, and the information of all those who can give any material evidence against him, and put the same in writing; and also bind over such who are able to give any such evidence, to the king's bench, or gaol delivery, and certify his proceedings to such court. 2 *Haw.*

39. *Hal. Pl.* 168. 1 *H. H.* 372.

3. And having committed the offender (for he is by no meansailable Bail. by justices of the peace, 3 *Ed.* 1. c. 15. 2 *Haw.* 99.) it may be adviseable for him to send an account immediately, of all the particulars, to a secretary of state.

4. By the statute of the 25 *Ed.* 3. st. 5. c. 2. (which lord *Hale* calls a *Treason by the sacred act*; and lord *Coke* an *excellent act*, and the king who made it a *blessed* 25 *Ed.* 3. king, and the parliament a *blessed* parliament;) All treasons which had been uncertain before, were settled. Which act, by the 1 *Mar. sess.* 1. c. 1. is reinforced, and again made the only standard of treason; and all statutes, between the said statutes of the 25 *Ed.* 3. and 1 *Mar.* which made any offences high or petit treason, or misprision of treason, are abrogated; so that no offence is at this day to be esteemed high treason, unless it be either declared to be such by the said statute of the 25 *Ed.* 3. or made such by some statute since the 1 *Mar.*

And therefore I shall first consider such offences as are high treason within the said statute of the 25 *Ed.* 3. and then such as are made treason by statutes subsequent to the said statute of the 1 *Mar.*

The words of the statute of the 25 *Ed.* 3. as to this matter, are as follow:

*Whereas divers opinions have been before this time, in what case treason shall be laid, and in what not; the king, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth; that is to say, When a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion (that is, his wife, 3 *Inst.* 9.) or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere; and thereof be probably (proveablement, proveably) attainted of open deed, by the people of their condition. And if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into the realm, counterfeit to the money of England, knowing the money to be false; and if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices.*

And by the statute of the 1 *Mar. sess.* 1. c. 1. (which lord *Hale* calls another excellent law) *No act, deed, or offence being by act of parliament made treason, by words, writing, ciphering, deeds, or otherwise whatsoever, shall be adjudged to be treason, but only such as be declared by the said statute of the 25 Ed.* 3. And this (he says) at one blow laid flat all the numerous treasons at any time enacted since the 25 *Ed.* 3. 1 *H. H.* 308.

Of open deed] Lord *Coke* (3 *Inst.* 14, 140.) seems to be of opinion, upon the said act of the 25 *Ed.* 3. that bare words are not a sufficient overt act, or open

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open deed, whereby to convict a person of treason; but that they are misprision of treason only. So also lord *Hale* (1 *H. H.* 111, 118. and elsewhere throughout) seemeth to think, that words, unless put into writing, are not regularly an overt act. But Mr. *Hawkins* (1 *Haw.* 39.) argues the contrary, and amongst other reasons for his opinion, he observes, that to charge a man with speaking treason is unquestionably actionable, which could not be, if no words could amount to treason: also, that as in case of felony, he who by command or persuasion induceth another to commit felony, is an accessory in felony, so he who does the same in treason, is a principal traitor (there being no accessories in treason, but all being principals); and yet such person doth no act but by words.

And it has been the constant practice, ever since the revolution at least, where a person by treasonable discourses hath manifested a design to murder or depose the king, to convict him upon such evidence. And in *Lowick's* case, *Holt* Ch. J. declared, that *express words* were not necessary to convict a man of high treason; but if from the tenor of his discourse the jury is satisfied he was engaged in a design against the king's life, this is sufficient to convict the prisoner. *Read Trea.* 146.

5. Offences made treason since the 1 *Mar.* are as follows:

(1) With regard to the *pretender*—By the 6 *Ann. c.* 7. If any person shall by writing or printing affirm, that the pretender hath any right to the crown, or any other person otherwise than according to act of parliament, he shall be guilty of high treason. And if any person shall by preaching, teaching, or advised speaking affirm the same, he shall incur a præmunire.

But no person shall be prosecuted for words, unless oath be made thereof before a justice in three days; and the prosecution be within three months; and the conviction on the oath of two witnesses.

And by the 2 *G. 1. c.* 4. The pretender and all his adherents and abettors shall stand convicted and attainted of high treason, and suffer pains of death, and incur all forfeitures as traitors convicted and attainted of high treason.

If any subjects of *Ireland* shall hold any intelligence or correspondence in person, or by letters, messages, or otherwise, with the pretender, or with any person employed by him, knowing such persons to be so employed, or shall remit or pay any money for the use or service of the said pretender, knowing such money to be for such use or service; such persons so offending, being lawfully convicted, shall be adjudged guilty of high treason, and shall suffer and forfeit as in cases of high treason.

Also by the 19 *G. 2. c.* 1. If any subjects of *Ireland*, shall within this realm or without, hold any correspondence in person or by letters, messages, or otherwise, with the eldest son, or other son or sons of the pretender, or with any person employed by any of them, knowing such persons to be so employed, or shall remit or pay any money, or receive any money with intent to remit or pay the same, for the use or service of any of them, knowing such money to be for such use or service, such persons so offending, being convicted, shall be adjudged to be guilty of high treason, and shall suffer and forfeit as in cases of high treason.

(2) Offences in relation to the coin, are made treason by many statutes; which are treated of in title *Coin*.

(3) Also

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(3) Also there are many offences made treason, with regard to the popish usurped jurisdiction; which are treated of under title **Hopery**.

14. In high treason, as hath been said before, there are no accessaries, but all are principals; and therefore whatsoever act or consent will make a man accessary to a felony before the act done, the same will make him a principal in case of high treason. *3 Inst. 9. 21.*

15. The judgment for high treason (not relating to the coin) is, That he shall be carried back to the place from whence he came, and from thence to be drawn to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out, and burnt before his face, and his head cut off, and his body divided into four quarters, and his head and quarters disposed of at the king's pleasure. *2. Haw. 443.* Judgment.

The judgment of a woman for high treason, is to be drawn and burnt, *3 Inst. 211.*

16. In the said judgment is implied forfeiture of lands and goods to the king, loss of dower, and corruption of blood. *3 Inst. 211.* Forfeiture.

Petit treason.

1. Moreover, there is another manner of treason, when a servant slayeth his master, or a wife her husband; or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience. *25 Ed. 3. ft. 5. c. 2.* Petit treason, what.

High treason is against the king, petit treason against the subjects. *3 Inst. 20.*

2. No person shall be convicted of petit treason, but on the oath of two witnesses, or confession. *En. ft. 1 Ed. 6. c. 12. f. 22.* Two witnesses.

3. The judgment against a man for petit treason is, that he shall be drawn to the place of execution, and there hanged by the neck till he be dead: The judgment against a woman is, that she shall be drawn to the place of execution, and there burnt. *2 Haw. 444.* Judgment.

4. The consequence of attainder, is, forfeiture of lands (to the lord of the fee), and of goods; loss of dower; and corruption of blood. *2 Haw. c. 49.* Forfeiture.

5. Although there can be no accessaries in high treason, yet in petit treason there may be accessaries both before and after. *3 Inst. 21.* Accessary.

And accessaries before the fact are ousted of clergy, by several statutes; but accessaries after the fact have their clergy in all cases of petit treason, for no statute takes it from them. *2 H. H. 342.*

Misprision of treason.

1. Misprision cometh of the French word *mespris*, which properly signifieth neglect or contempt: And misprision of treason, in legal understanding, signifieth, when one knoweth of any treason, though no party or consenter to it, yet conceals it, and doth not reveal it in convenient time. *3 Inst. 36. 1 H. H. 371.* Misprision, what.

Judgment.

2. The judgment of misprision of treason is, to be imprisoned during life, to forfeit all his goods for ever, and the profits of his lands during life. 3 *Inst.* 36.

Caution.

3. Every man therefore that knoweth a treason, ought with all speed to reveal it to the king, his privy council, or other magistrate. *H. Pl.* 127.

Misprision of petit treason.

4. But it seemeth that misprision of petit treason is not subject to the judgment of misprision of high treason, but only is punishable by fine and imprisonment, as in the case of misprision of felony. 1 *H. H.* 375.

Treasure found.

Treasure trove what.

1. **T**REASURE trove, or treasure found, is, where any gold or silver, in coin, plate, or bullion, hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the king, or to some other by the king's grant, or prescription. 3 *Inst.* 132.

Gold or silver] For if it be of any other metal, it is no treasure; and if it be no treasure, it belongs not to the king, for it must be *treasure trove*. 3 *Inst.* 132.

Wheresoever it be found] Whether it be of ancient time hidden in the ground, or in the roof or walls, or other part of a castle, house, building, ruins, or elsewhere, so as the owner cannot be known. 3 *Inst.* 132.

Belong to the king] The reason whereof is a rule of the common law, that such goods whereof no person can claim any property, belong to the king; as wrecks, strays, and the like. 3 *Inst.* 132.

Taking treasure trove, not felony.

2. Larceny cannot be committed of such things whereof no man hath any determinate property, though the things themselves are capable of property, as of treasure trove, or wreck till seized; though he that hath them in point of franchise, may have a special action against him that takes them. 1 *H. H.* 510.

But finable.

3. The punishment for concealment of treasure trove, is by fine and imprisonment. 3 *Inst.* 133.

The coroner may inquire thereof.

4. And it belongeth to the coroner to enquire thereof. 3 *Inst.* 133.

Concerning which it is enacted by the 4 Ed. 1. ft. 2. that a coroner being certified by the king's bailiffs, or other honest men of the country, shall go to the places where treasure is said to be found. And it is further enacted in the same statute, that the coroner ought to inquire of treasure that is found, who were the finders, and likewise who is suspected thereof; and that may be well perceived, where one liveth riotously, haunting taverns, and hath done so of long time; hereupon he may be attached for this suspicion, by 4, or 6, or more pledges, if he may be found.

Also the sheriff in his torn.

5. Also it seems to be agreed, that all seizures of treasure trove, belonging to the king, may be inquired of in the sheriff's torn: But it seems questionable, whether a prescription in a court leet to inquire of such seizure belonging

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ing to the lord of it, being a subject, be good or not, since it is against the general rule of the law, for the leet to take cognizance of trespasses done to the private damage of the lord, because that would make him his own judge.
2 *Haw.* 67.

Treasurer.

BY the act 33 G. 2. c. 13. As often as any vacancy shall happen by the death, misbehaviour, or resignation of any county-treasurer in this kingdom, the justices of the peace for such county, at the general quarter sessions which shall be held for such county next after such vacancy, on the first day of such quarter sessions, shall appoint a proper person to serve as treasurer of such county, who shall before the next going judges of assize for said county, enter into a recognizance in the sum of one thousand pounds, and procure two sufficient sureties, who shall enter into a recognizance in the sum of five hundred pounds each.

The condition of which recognizance to be, that such treasurer shall, at every assizes, unless prevented by sickness, or unavoidable necessity, justly account upon oath, in the usual manner, for such public money belonging to such county, as he shall have received or paid since the foregoing assizes; and that such treasurer, his heirs, &c. shall upon the death, &c. of such treasurer, pay and hand over such balance of money as shall appear to be due by such treasurer; and also all the books, papers, and records of said county, to his successor in said office, when appointed as aforesaid, which recognizances shall remain in the hands of the clerk of the crown, to be kept among the records of such county.

No person being treasurer of any county, shall, during his continuance in said office, be capable of being clerk of the crown of the said county, or exercise the office of justice of the peace, or be on a grand jury for such county, for which he is a treasurer.

When any persons intitled to receive public money, shall apply to the treasurers, the said treasurers shall, without delay, pay to such persons the whole of what he and they shall be intitled to receive, without any deduction whatsoever; and if he shall refuse to do so, upon complaint made thereof upon oath before the next going judge of assize, such judge shall lay a fine upon such treasurer so refusing, not exceeding ten pounds.

- I. Impotent beggars.*
- II. Strong beggars.*
- III. Incorrigible rogues.*
- IV. Stroling vagabonds and idlers.*
- V. Penalty for not apprehending.*
- VI. Penalty for lodging vagrants.*
- VII. Rescuing vagrants.*
- VIII. Search for vagrants.*
- IX. Transporting vagrants.*
- X. Discharging vagrants.*
- XI. Beggars and vagrants in Dublin.*

I. Impotent beggars.

1. **B**Y the act 33 Hen. 8. ff. 1. c. 15. The justices of the peace of all the shires, and all other justices of peace, mayors, sheriffs, bailiffs, and officers of every city, borough, or franchises, within the limits of their authority, shall divide themselves within the said shires, &c. whereof they be justices or officers; and shall make diligent search and inquiry of all aged and poor and impotent persons, which of necessity be compelled to live by alms within the limits of their division; and upon such search the said justices, mayors, sheriffs, bailiffs, and other officers, every of them within their limits whereunto they be divided, shall have authority to enable to beg within such city, town, parish, or other limits, as they shall appoint, such of the said impotent persons which they shall think most convenient within the limits of their division, to live of the charity and alms of the people, and to give in commandment to every such aged and impotent beggar, by them enabled, that none of them shall beg without the limits to them so appointed, and shall also register the names of every such impotent beggar by them appointed, in a bill of roll indented, the one part thereof to remain with themselves, and the other part to be certified before the justices of peace at the next sessions to be holden within the said shires, cities, towns, or franchises, to remain under the keeping of the *custos rotulorum*. f. 2.

And the said justices, mayors, bailiffs, and other officers, as they be divided, shall have authority to make seals to be engraved with the names of the places within the which they shall appoint and limit every such impotent person to beg, and commit the said seals to the custody of such as they shall think convenient; and shall make and deliver to every such impotent person by them enabled to beg, a letter containing the name of such impotent person, and witnessing that he is authorized to beg, and the limits within which he is appointed to beg, the same letter to be sealed with such of the said seals as shall be engraved with the names of the limit wherein
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such impotent person shall be appointed to beg in, and to be subscribed with the name of one of the said justices or officers abovesaid.

If any such impotent person, so authorized to beg, do beg in any other place than within such limits that he shall be assigned unto, the justices and all other the king's officers shall by their discretions punish all such persons by imprisonment in the stocks, by the space of two days and two nights, giving them but only bread and water, and after that cause every such impotent person to be sworn to return again without delay to the town, parish, or franchises, where they be authorized to beg in.

2. No such impotent person shall beg within any part of this realm, except he be authorized by writing under seal as is above said; and if any such impotent person be vagrant and go a begging, having no such letter under seal as is above specified, the constables, and all other inhabitants within such town or parish where such person shall beg, shall cause every such beggar to be taken and brought to the next justice of peace or high constable of the hundred. *f. 3.*

And the said justice or high constable shall command the said constables and other inhabitants which shall bring before him any such beggar, that they shall strip him naked from the middle upward, and cause him to be whipped within the town where he was taken, or within some other town where the justice or high constable shall appoint, if it shall seem to the discretion of the said justice or high constable that it be convenient so to punish such beggar to him brought, and if not, then to command such beggar to be set in the stocks in the town or parish where he was taken, three days and three nights, there to have only bread and water; and thereupon the said justice or high constable shall limit to him a place to beg in, and give to him a letter under seal in form above remembered, and swear him to depart and repair thither immediately after his punishment.

3. Every letter to be made by the authority of this act, whereby any impotent beggar shall be authorized and assigned to beg, shall be made in this form ensuing. *f. 12.*

¶ Kanc. ff. ¶ Memorand' that A. B. of Dale for reasonable considerations is licenced to beg within the hundred of P. K. and L. in the said county. Given under the seal of that limit. Tali die & anno.

4. And every such letter that shall be made and delivered to such beggar or vagabond, after he hath been whipped by authority of this act, shall be made in this wise following. *f. 13.*

¶ Kent ¶ J. S. whipped for a vagrant strong beggar, at Dale in the said county, according to the law the 22d day of July in the 23d year of king Henry the eighth, was assigned to pass forthwith and directly from thence to Sale in the county of Middlesex, where he saith he was born, or where he last dwelled by the time of three years, and he is limited to be there within 14 days next ensuing at his peril, or within such number of days as to him shall be limited by the discretion of the maker of the said letter, in witness whereof the seal of the limit of the said place of his punishment hereunto is set.

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5. Every such letter shall be made at the equal costs of such of the said justices, mayors, sheriffs, bailiffs, and other officers, within whose jurisdictions the said beggar or vagabond shall be whipped or limited to beg in, and shall be subscribed with the hand of one of the said justices, mayors, sheriffs, bailiffs, or other officers, in this form following. *f. 14.*

Per me A. B. unum justiciariorum pacis, or majorem civitatis, or ballivum villæ, or constabularium talis hundredi, or else in like form in English.

II. Strong beggars.

By the act 33 H. 8. *ff. 1. c. 15.* If any persons able to labour, be taken in begging, or if any man or woman able to labour, having no land, master, nor using any lawful merchandise, craft, or mystery, whereby he might get his living, be vagrant, and can give no reckoning how he doth lawfully get his living, it shall be lawful to the constables, and all other officers and subjects, to arrest the said vagabonds and idle persons, and them bring to any of the justices of peace of the same shire or liberty, or else to the high constable of the hundred, &c. within which such persons shall be taken; and if he be taken within any city or town-corporate, then to be brought before the mayor, sheriffs, or bailiffs of such town-corporate. *f. 4.*

And every such justice, &c. by their discretions shall cause every such idle person to be had to the next market-town, or other place where the said justices and other officers, &c. shall think most convenient, and there to be tied to the end of a cart naked, and be beaten with whips throughout the market-town or other place, till his body be bloody by whipping, and after such whipping had, the person so punished, by the discretion of the justice, &c. shall be enjoined upon his oath, to return without delay in the next and strait way to the place where he was born, or where he last dwelled by the space of three years, and there to put himself to labour.

Every person so ordered, shall have a letter sealed with the seal of the hundred, city, borough-town, or franchise wherein he shall be punished, witnessing that he hath been punished according to this statute, and containing the day and place of his punishment, and the place whereunto he is limited to go, and by what time he is limited to come thither, within which time he may lawfully beg by the way, shewing the same letter, and otherwise not; and if he do not accomplish the order to him appointed by the said letter, there to be taken and whipped; and so as often as any default shall be found in him, contrary to the order of this statute, in every place to be taken and whipped, till he be repaired where he was born, or where he last dwelled by the space of three years, and there labour for his living without begging, as long as he is able so to do. *f. 5.*

If the person so whipped be an idle person, and no common beggar, after such whipping he shall be kept in the stocks, till he have found surety to go to service or to labour, after the discretion of the said justice, &c. if by the discretion of the same justice or other officer it be so thought convenient; and the party so punished be able to find surety, or else to be ordered and sworn to repair to the place where he was born, or where he last dwelled by the space of three years, and to have like letter, and such further

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further punishment if he offend, as is above appointed for the common strong and able beggars; and so from time to time to be punished till he labour, or otherwise get his living, according to the law.

III. Incurrible rogues.

By the act 10 & 11 Car. 1. c. 4. For that many wilful people finding that they have children, have some hope to have relief from the parish wherein they dwell, and being able to labour, and thereby to relieve themselves and their families, do nevertheless run away out of their parishes, and leave their families upon the parish; all such persons so running away, shall be deemed to be incurrible rogues, and endure the pains of incurrible rogues. *f. 9.*

And if either such man or woman being able to work, and shall threaten to run away, and leave their families as aforesaid, the same being proved by two sufficient witnesses upon oath, before two justices of peace in the county where they dwell, or whither they run; the said person so threatening, shall by the said justices of peace be sent to the houses of correction, unless he or she can put in sufficient sureties for the discharge of the parish, there to be dealt with and detained as a sturdy and wandering rogue, and to be delivered by the justices at any of their meetings, or at their quarter-sessions, and not otherwise.

IV. Strolling vagabonds and idlers.

By the act 10 & 11 Car. 1. c. 4. *f. 8.* (1) All persons calling themselves scholars, going about begging.

(2) All idle persons going about, either begging, or using any subtle craft or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, fortunes, or such other like fantastical imaginations.

(3) All persons that be, or utter themselves to be proctors, procurers, patent-gatherers, or collectors for gaols, prisons or hospitals.

(4) All fencers, bearwards, common players of interludes and minstrels, wandering abroad.

(5) All jugglers, and wandering persons, and common labourers, able in body, and refusing to work for such reasonable wages as is taxed and commonly given in such parts where such persons dwell, not having living otherwise to maintain themselves.

(6) All persons delivered out of gaols that beg for their fees, or otherwise travel begging.

(7) All such as shall wander abroad, pretending loss by fire or otherwise.

(8) All such as pretend themselves to be *Egyptians*, or wander in the form or attire of counterfeit *Egyptians*.

Shall be adjudged rogues, vagabonds, and sturdy beggars, and shall sustain such punishments as are appointed by a statute made in the three and thirtieth year of king *Henry* the eighth, c. 15. in this kingdom against vagabonds;

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vagabonds; or be otherwise dealt withal by sending them to the house of correction in the county where they shall be found, as to the justices of the peace of the said county, or to any one of them, shall be thought fit.

And by the 10 & 11 *Car. 1. c. 16.* If any person that hath no means of ability of his own, or sufficient means of support from his parents and kindred, shall walk up and down the country with their fosterers or kindred and retinue, or shall cosher, lodge, or cefs themselves, their followers, their horses, or their greyhounds upon the inhabitants; or shall exact meat or drink or money from them, or shall crave any helps in such sort as the poor people dare not deny the same, for fear of some scandalous rhyme or song to be made upon them, or some worse inconvenience to be done them.

It shall be lawful for every justice of peace, and for the justices of assize in their several circuits, to apprehend or cause to be apprehended all such persons, and them to bind to their allegiances, or to the good behaviour, and to commit the said persons to the common gaol of the county, until they shall find bonds by recognizance, with very good sureties.

Which justice shall return all such bonds or recognizances so taken, at the next general sessions of the peace for the county where the same shall be taken.

And all sheriffs, bailiffs, constables, provosts, marshals, and other subjects, are required to be assisting to every justice of the peace, and justices of assize, in the apprehending of the said cosherers and wandering idlers, when they shall be required, upon pain of such fines to be set upon them for their neglect, as upon conviction before the justices at their general sessions of the peace, or before the justices of assize at their discretion, shall be set upon them for their default.

Also by the 33 *Hen. 8. ff. 1. c. 15.* Scholars of the universities that go about begging, not being authorized under the seal of the said universities by the commissary, chancellor, or vice-chancellor of the same, and all shipmen, pretending losses of their ships and goods on the sea, going about the country begging, without sufficient authority witnessing the same, shall be punished and ordered in manner as is above rehearsed of strong beggars. *f. 7.*

And all proctors and pardoners, going about without sufficient authority, and all other idle persons going about in any country, or abiding in any city or town, some of them using divers crafty and unlawful games and plays, and some of them faining themselves to have knowledge in physick, physiognomy, palmistry, and other crafty sciences, shall, upon examination before two justices of the peace, whereof the one shall be of the *quorum*, if he by proveable witness be found guilty of any such deceits, be punished by whipping at two days together, after the manner before rehearsed.

And if he afterwards offend in any like offence, then to be scourged two days, and the third day to be put upon the pillory from nine of the clock till eleven before noon, and to have one of his ears cut off; and if he offend the third time, to have like punishment, with whipping, standing on the pillory, and to have his other ear cut off.

Justices of the peace have like authority in every liberty and franchise within their shires, where they be justices of the peace, for the execution of this act, as without.

V. Penalty

V. Penalty for not apprehending.

By the said statute 33 Hen. 8. §. 1. c. 15. And that the justices of the peace shall have authority within the limits of their commissions, to inquire of all mayors, bailiffs, constables, and other officers and persons that shall be negligent in executing of this act. §. 6.

And if the constables and inhabitants where any such impotent person or strong beggar doth beg contrary to this statute, be negligent, and take not every such beggar, and order and punish every such beggar as is above limited, the township or parish where such default shall be, shall forfeit for every such impotent beggar that shall be suffered to beg within the said township or parish, not being taken, ordered, and punished according to this statute, 3s. 4d. and for every strong beggar 6s. 8d. the one half of which forfeitures to be to the king, and the other half to him that will sue for the same, before the justices in their general sessions, within the shire or liberty where such default shall happen.

And all justices of peace shall have authority as well to hear and determine every such default by presentment, as by such information, and upon every presentment, and every such information, to make process by distress against the inhabitants of such town and parish where any default shall be presented, or supposed by such information, by authority of which distress the sheriff or other officer shall distrain the goods of such one or two of the inhabitants, as he may have knowledge were most in default, in the execution of this act; and the said distress retain, till they find surety to appear at the next sessions limited in their said distress.

And in case they appear, and confess the default, or else if they traverse the presentment, and it be tried against them by verdict, or deny the information, and it be proved against them by sufficient witness, the said justices in their sessions shall assess the fines after the rates abovesaid, and make process for the levying of the same, by distress of the inhabitants of such towns or parishes where such default shall be tried or proved.

And every such fine, if it grow by presentment, to be only to the king's use, and if by information, the moiety thereof to be to him that pursueth the information, and the other moiety to the king's use.

And if any such persons distrained, appear not at the day and place contained in such distress, then upon the return of the sheriff or other officer that such persons were distrained, every such person at the first distress shall lose 40d. and at the second 6s. 8d. and so to be doubled upon every distress in such cases to be awarded, till appearance may be had by one of the inhabitants of such town or parish to deny, traverse, or confess the presentment or information exhibited against such town or parish, that upon trial or proof thereof the fines above limited may be assessed and levied of the inhabitants, as is above.

VI. Penalty for lodging vagrants.

By the same statute 33 Hen 8. ff. 1. c. 15. If any person give harbour, money, or lodging, to any beggars able to work, which order themselves contrary to this statute, every such person being sufficiently proved or presented before any justice of peace, shall make such fine to the king, as by the discretion of the justices at their general sessions shall be assessed. *f. 9.*

Provided, that it be lawful to every person being bounden by reason of any foundation or ordinance to give or distribute any money in alms, and also to every person at common *doles* used at burials or *obits*, to give and dispose in alms, any money to persons coming to such alms or *doles*, after like manner as they have been accustomed to do before the making of this act, without any danger or penalty of this statute. *f. 17.*

Provided, that it be lawful to all masters and governors of hospitals to lodge and harbour any persons of charity or alms, according to the foundation of such hospitals, and to give money in alms, as they are bounden to do.

VII. Rescuing vagrants.

And moreover, by the same statute 33 Hen. 8. ff. 1. c. 15. If any persons disturb or let the execution of this act, or make rescous against any person that shall endeavour for the due execution thereof, every such person, for every offence, shall forfeit 100 s. and have imprisonment at the king's will; the one half of which forfeit, if such offence be committed in any city or town-corporate, to be to the mayor or other head officers, to the use of the commonalty of such city or town-corporate. *f. 9.*

And if it be committed out of the city or town corporate, the said one half to be to the lord of the fleet or lawday where such offence shall be done, and the other half of every such forfeit to be to the king; for the which forfeit of 5*l.* recovery shall be had by action in any of the king's courts, in which suits the defendants shall not wage their law, nor have any effoign or protection allowed.

VIII. Search for vagrants.

By the act 10 & 11 Car. 1. c. 4. The said justices of peace of every county, or any two of them, twice in every year, and oftner if there be occasion, shall assemble for the better execution of this statute, and four or five days before their meeting, the said justices shall by their warrant, command the constable of every barony, town, parish, village, and hamlet within the county, or so many of them as they shall think fit, which shall be assisted with sufficient men of the same places, to make a general privy search in one night, for the finding out and apprehending of rogues, vagabonds, wandering and idle persons. *f. 7.*

And such as they shall find and apprehend in the said search, shall be brought before the justices at their said assembly, to be punished according to a statute made in the three and thirtieth year of king Henry the eighth

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eight against vagabonds, or by their warrant to be sent unto the houses of correction within the said county appointed, there to be delivered unto the master, or to his deputy or assignee, to be set to labour.

At which times of meeting so to be held by the justices, the constables of the said baronies, parishes, towns, villages, and hamlets, shall appear, and there shall account upon oath in writing, what rogues, vagabonds, and wandering and disorderly persons they have apprehended, both in the search, and also between such assemblies, and how many have been by them punished, or sent unto the houses of correction.

Which if the said constables shall neglect to perform, as also to convey safely all such rogues, with all other idle or disorderly persons, at the charge of the constablewick as by the justices warrants, shall be sent unto the houses of correction in the same county, they shall forfeit such further fines and penalties, as by the said justices of peace shall be thought fit, not exceeding forty shillings for every offence.

IX. Transporting vagrants.

By the act 6 Ann. c. 11. All loose, idle vagrants, and such as pretend to be *Irish* gentlemen, and will not work, nor betake themselves to any honest trade or livelihood, but wander about demanding victuals, and coshering from house to house, and also loose persons of infamous lives and characters, shall, upon the presentments of the grand juries at the assizes, and at the general quarter-sessions of the peace of the respective counties where such persons frequent; and upon the warrants from the justices of assize, or justices of the peace at their respective quarter-sessions, be sent to gaol, until they shall be sent on board her majesty's fleet, or to some of her majesty's plantations in *America*, whither such justices of the assize, and justices of the peace at their general quarter-sessions, are authorized to send such persons, unless they give sufficient security to be of the good behaviour. *§. 1.*

This clause is altered by st. 9. G. 2. c. 6. §. 3. as to the power given to the grand juries, at the quarter-sessions, of making presentments of vagrants, &c. and this act is continued by st. 29 G. 2. c. 8. for twenty one years, &c.

By the act 9 G. 2. c. 6. It shall not be lawful for the grand jury at any general quarter sessions of the peace to be held for any county, the county of the city of *Dublin* and county of *Dublin* excepted, to make such presentments, as by st. 6 Ann. c. 11. are allowed to be made; but all presentments made by such grand juries, except as before excepted, and all orders and warrants grounded thereon, shall be void. *§. 3.*

It shall be lawful for every person presented by any grand jury at the assizes, to traverse such presentment, which traverse shall be tried and determined the same assizes in which such presentments are made, in case the persons so presented are then in custody in the gaol of the said county, or at the next ensuing assizes, according to the direction of the judge before whom such presentment shall be made. *§. 4.*

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And in the mean time such person so presented and traversing, shall continue in gaol, unless he or she shall give sufficient security by recognizance to be of good behaviour, before such justices as shall be for that purpose appointed, by order of the court where such presentment is made.

And in case the persons so presented shall be at large at the time of such presentment, the court shall award process to issue against them; and if they shall be apprehended upon such process, or by warrant from any justice of the peace of the county where such persons shall be so presented, such persons so apprehended, shall be committed to gaol till the next assizes, unless such persons so taken shall give sufficient security by recognizance to be of good behaviour, before such justices of the peace as the court at the time of awarding process against them shall appoint for that purpose.

And in case such persons so presented and apprehended at the next assizes, shall be found in gaol, and cannot then give sufficient security to be of the good behaviour, or in case of a traverse, such traverse shall be found against them, such person or persons shall be sent on board his majesty's fleet, or be transported to some of his majesty's plantations in *America*.

X. Discharging vagrants.

By the act 2 G. 1. c. 17. The master and keeper of every house of correction or workhouse, at every general quarter sessions of the peace to be held for the county, city, or town, wherein such house of correction or workhouse is, shall deliver to the justices at the said quarter sessions, an exact calendar, or an account of the names of every person in his custody, in writing, and signed by him, together with the time when, and for what, and by whom committed to him, to the end the justices may in open court enquire into the cause of such commitment, and the condition and circumstances of each person, and either continue or discharge them, as shall seem to the court most reasonable. *f. 22.*

And every master or keeper of such house of correction or workhouse, failing herein, shall for every such neglect forfeit five pounds to such persons as shall be in his custody, and not returned by him in calendar as aforesaid, to be recovered before the next going justices of assize in a summary way, or at the next quarter sessions in the county of *Dublin*, by civil bill.

XI. Beggars and vagrants in Dublin.

By the act 19 G. 2. c. 21. *f. 11.* Every beadle or bell-hour of each parish within the city or suburbs of *Dublin*, or the liberties thereto adjoining, and every constable within their respective districts, and every inhabitant in any of the parishes aforesaid, calling to his or her assistance the beadle of the parish, or a constable, shall have authority to apprehend and bring before any one of the governors of the workhouse, or any one of his majesty's justices of the peace of the said city, any sturdy beggar, or other idle vagabond, that such beadle or bell-hour, constable or inhabitant shall find, or be informed of, to be begging, strolling,
or

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or frequenting any of the streets or houses within the said city or suburbs, or the liberties thereunto adjoining.

And the said governor or justice of the peace are impowered, by warrant under his hand and seal, to commit the said persons who shall be so apprehended and brought before them to the workhouse, there to be confined and kept to hard labour, if he shall think fit to direct by his said warrant, until the next general court of assembly, where such sturdy beggars or vagabonds shall be brought and examined by the said governors.

And if the said governors at the next general court of assembly, not being less than fifteen in number, shall see sufficient cause, they shall confine such sturdy beggars or vagabonds in the said workhouse, for any term not longer than four years, there to be kept to hard labour, or otherwise employed, as they shall order.

And if any beadle, bell-hour, or constable, shall when called or sent for by any inhabitant aforesaid, neglect or refuse to apprehend and bring before one of the governors of the said workhouse, or one of his majesty's justices of peace of the said city, any sturdy beggar, or other idle vagabond that shall be found begging or strolling in any of the streets or houses within the said city or suburbs, or the liberties thereunto adjoining, such beadle, bell hour, or constable shall for every such offence forfeit to the governors of the workhouse for the use of the said house twenty shillings; to be recovered, in case of non-payment, by distress and sale of the goods of such offenders, by warrant under the hands of the said governors present at any such general court of assembly, or any five of them.

Which warrant they on complaint and proof made of such neglect or refusal, are required to grant; and in case such beadle, bell-hour, or constable, shall not be able to pay the fine imposed upon them, such beadle, bell-hour, or constable, shall be subject to like penalties, as are by this act imposed upon any beggars or vagrants.

If any person shall be sued for any thing done in pursuance of this act, the defendant may plead the general issue, &c. and if a verdict shall pass for the defendant, or judgment be given against the plaintiff upon demurrer, or the plaintiff be nonsuit, or discontinues, the defendant shall have double costs. *s. 12.*

No writ of *certiorari* shall supersede execution, or other proceedings upon any order made by the said court of assistants, in pursuance of this act, but execution and other proceedings shall be had thereupon, any such writ or allowance thereof notwithstanding. *s. 13.*

By the act 23 G. 2. c. 11. *s. 10.* Whereas several strolling beggars and vagrants labouring under various disorders, which render them not only offensive to the sight, but also dangerous to the health of many of the inhabitants of the city of *Dublin*, do daily resort to, and beg alms in the public streets of the said city, and the liberties adjacent, it shall be lawful for any member of the court of assistants, appointed by the governors of the workhouse, by warrant under his hand and seal, to commit every such beggar and vagrant as shall be found within the city of *Dublin*, or the liberties thereof, or within the several liberties of *Saint Sepulchre's*, *Saint Patrick's*, *Christ-church*, *Thomas-court* and *Donore*, to the said workhouse for thirty one days.

And

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And if any three physicians or surgeons attending upon, or being governors of the said workhouse, of which his majesty's state physician or surgeon general to be always one, shall within the said thirty one days certify under their hands and seals to the governors of the workhouse, that such beggars or vagrants labour under any incurable disorder, or under any disorder dangerous to the inhabitants of the said city, it shall be lawful for the said governors of the workhouse, or any five of them, by warrant under their hands and seals, to confine such beggars or vagrants, if curable, in any house appointed by the said governors, or any five of them, within the said city for that purpose, until they shall be cured of the disorders they labour under, and such as are incurable, for the space of five years next after the date of such warrant.

Examination of a vagrant.

Dublin. **T**HE examination of A. O. a rogue and vagabond, taken on oath before me ——— one of his majesty's justices of the peace in and for the said county, the ——— day of ——— in the ——— year of the reign of ———

Who on his oath saith, That he was born at ——— [and so trace out the history of his life, so far forth as to ascertain his legal place of settlement.]

A. O.

*Taken and signed the day and year above written,
before me the abovesaid*

+
his mark.

J. P.

Warrant to the constable for whipping a vagrant.

Dublin. { To the constable of ———

FORASMUCH as A. O. a rogue and vagabond, was this day found wandering and begging in the parish of ——— in the said county, not having obtained any legal settlement there, and was thereupon apprehended, and is now brought before me H——. R——. clerk, one of the justices of our lord the king assigned to keep the peace within the said county, that he may be punished and dealt withal according to law: These are therefore to command you to strip, or cause to be stripped, the said A. O. naked from the middle upwards, and to whip him, or cause him to be publicly whipped, at the common whipping post in your said parish; and afterwards to remove and convey the said A. O. according to the directions of the pass herewith delivered to you: Given under my hand and seal at ——— in the said county, the ——— day of ——— in the ——— year ———

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Commitment of a vagrant to the house of correction.

Dublin. { To the constable of _____ in the said county, and to the
keeper of the house of correction at _____ in the said
county.

FORASMUCH as A. O. a rogue and vagabond, was this day found wandering and begging in the parish of _____ in the said county, not having obtained any legal settlement there, and was thereupon apprehended, and is now brought before me R_____ B_____, clerk, one of the justices of our lord the king assigned to keep the peace within the said county, that he may be punished and dealt withal according to law: These are therefore to command you the said constable, to carry the said A. O. to the said house of correction, and deliver him to the said keeper thereof, together with this warrant: And I do hereby command you the said keeper to receive the said A. O. into your custody in the said house of correction, and him there safely to keep until the next general quarter sessions of the peace to be holden for the said county: And have you him then there, together with this precept. Given under my hand and seal at _____ in the said county, the _____ day of _____ in the _____ year of the reign of _____

Warrant.

FOR a warrant to search for stolen goods, see **Search Warrant.**

If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon; and so he may by word command any person to apprehend him, and such command is a good warrant without writing: but if the same be done in his absence, then he must issue his warrant in writing. *H. H. 86.*

Concerning which we will shew,

- I. For what causes it may be granted.
- II. What is to be done previous to the granting of it.
- III. How far it is grantable on suspicion.
- IV. The form of it.

I. For what causes it may be granted.

There seems to be no doubt, but that a warrant may be lawfully granted by any justice, for treason, felony, or præmunire, or any other offence against the peace: Also it seems clear, that wherever a statute gives to any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute; for
it

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it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him. *2 Haw. 84.*

But in cases where the king is no party, or where no corporal punishment is appointed, as in cases for servants wages, and the like, it seemeth that a *summons* is the more proper process; and for default of appearance the justice may proceed; and so indeed oftentimes it is directed by special statutes.

II. What is to be done previous to the granting of it.

It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing. *1 H. H. 582. 2 H. H. 111.*

Or at least it is safe to bind him over to give evidence; lest afterwards when the offender shall be apprehended, or shall surrender himself, the party that procured the warrant be gone. *Dalt. c. 169.*

III. How far it is grantable on suspicion.

Lord *Hale* proves at large, contrary to the opinion of lord *Coke* (4 *Inst.* 177.) that a justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted; and that, though the original suspicion be not in himself, but in the party that prays his warrant. *2 H. H. 107—110.*

For the justices are judges of the reasonableness of the suspicion, and when they have examined the party accusing, touching the reasons of his suspicion, if they find the causes of suspicion to be reasonable, it is now become the justices suspicion as well as theirs. *2 H. H. 80.*

And in another place speaking of this opinion of lord *Coke*, he delivers himself seemingly with a kind of warmth not usual to him: I think, says he, the law is not so, and the constant practice in all cases hath obtained against it, and it would be pernicious to the kingdom if it should be as lord *Coke* delivers it: for malefactors would escape unexamined and undiscovered, for a man may have a probable and strong presumption of the guilt of a person, whom yet he cannot positively swear to be guilty. *1 H. H. 579.*

Mr. *Hawkins* likewise seems to be of the same opinion against lord *Coke*, but delivereth himself with his wonted caution and candour: It seems probable, he says, that the practice of justices of the peace in relation to this matter, is now become a law, and that a justice may justify the granting of a warrant for the arrest of any person, upon strong grounds of suspicion, for a felony or other misdemeanor, before any indictment hath been found against him; yet inasmuch as justices claim this power rather by connivance, than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as the liberty of the party, a justice cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause

cause as might induce a candid and impartial man to suspect the party to be guilty. 2 Haw. 85.

But a general warrant, upon a complaint of a robbery, to apprehend *all persons suspected*, and to bring them before a justice, hath been ruled void; and false imprisonment lies against him that issues such a warrant. 1 H. H. 580. 2 H. H. 112.

IV. The form of it.

1. Mr. Dalton says, the warrant is the better, if it bear date of the place where it was made. Dalt. c. 169.

And lord Hale says, the place, though it must be alledged in pleading, need not be expressed in the warrant. 2 H. H. 111.

And Mr. Hawkins says, It is safe, but perhaps not necessary, in the body of the warrant to shew the place where it was made; yet it seems necessary to set forth the county in the margin at least, if it be not set forth in the body. 2 Haw. 85.

2. It may be directed to the sheriff, bailiff, constable, or to any indifferent person by name who is no officer; for the justice may authorize any one to be his officer, whom he pleases to make such; yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed, for that no other constable, and *a fortiori* no private person, is compellable to serve it. 2 Haw. 85. Dalt. c. 169. 2 H. H. 110.

But in the case of an act of parliament, it is said, that if the act directeth that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law it must be directed to the constable, and it cannot be directed to the sheriff, unless such power is given in the act. L. Raym. 1192. 2 Salk. 381.

3. The warrant may be stiled in divers manners: As 1. In the name of the king; and yet the teste must be under the name of the justice that grants it out. Or, 2. It may be stiled and made only in the name of the justice. Or, 3. It may be made without any such stile, and only under the teste of the justice, or only subscribed by him. As followeth:

In the king's majesty's name.

Dublin. **G**EORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth;
To our sheriff of the county of ——— to the high constables of the hundred of ——— in the same county, and to the petty constables of the town of ——— in the same county, and to all and singular our bailiffs and ministers in the same county, as well within liberties, as without, greeting:

Forasmuch as A. I. of ——— hath come before J. P. esquire, one of our justices assigned to keep our peace within the said county, and hath, &c.

(Concluding it in the justices name, as thus;) Witness the said J. P. at ——— the ——— day of ———.

Note, That wheresoever the warrant is made in the king's name, there it ought to be directed to all ministers, as well within liberties, as without, for

Warrant.

that the king is made a party : And so it may be done in all other warrants, especially for felony, or for the peace or the good behaviour, because it is the service of the king. *Dalt. c. 174.*

Or thus, in the name of the justice himself.

Dublin. **J.** *P. esquire, one of the justices of our lord the king, assigned to keep the peace within the said county ; To the sheriff of the said county, to the bailiff or constables of the hundred of — within the said county, to the petty constables of the town of — within the said hundred and county, and to all other the ministers and officers of our said lord the king within the said county, and to every of them, greeting :*

Forasmuch as, &c. Given under my hand and seal the — day of, &c.
Dalt. c. 174.

4. Regularly, the warrant, especially if it be for the peace or good behaviour, or the like, where sureties are to be found or required, ought to contain the special cause and matter, whereupon it is granted; to the intent that the party upon whom it is to be served, may provide his sureties ready, and take them with him to the justice to be bound for him; but if the warrant be for treason, murder, or felony, or other capital offence, or for great conspiracies, rebellious assemblies, or the like, it needs not contain any special cause, but there the warrant of the justice may be to bring the party before him, to make answer to such things or matters generally, as shall be objected against him on the king's behalf. *Dalt. c. 169. 2 Haw. 85. 2 H. H. 111.*

But Mr. *Lambard* says, every warrant made by a justice of the peace ought to comprehend the special matter upon which it proceedeth; even as all the king's writs do bear their proper cause in their mouth with them: And as for the form that is commonly used, *to answer to such things as shall be objected*, and such like, they were not fetched out of the old learned precedents, but lately brought in by such as either knew not, or cared not, what they writ. *Lamb. 87.*

5. The warrant ought regularly to mention the name of the party to be attached, and must not be left in generals, or with blanks to be filled up by the party afterwards. *2 H. 114. Dalt. c. 169.*

6. The warrant may issue to bring the party before the justice who granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. *1 H. H. 582. 2 H. H. 112.*

7. It ought to set forth the year and day wherein it is made, that in an action brought upon an arrest by virtue of it, it may appear to have been prior to such arrest; and also, in case where a statute directeth the prosecution to be within such a time, that it may appear, that the prosecution is commenced within such time limited: Likewise, where a penalty is given to the poor of the parish where the offence shall be committed, or the like, it ought to specify the place where the offence was committed. *2 Haw. 85.*

8. Finally,

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8. Finally, it ought to be under the hand and seal of the justice who makes it out. 2 Haw. 85.

The execution of a warrant belongs to title **Arrest**.

Watch.

WATCHING is properly intended of the night, and warding for the day time. *Dalt. c. 104.* Watch and ward.

Watches are of three kinds:

1. That which is appointed by the statute of *Winchester, c. 4.* and is enforced by the *5 H. 4. c. 3.* which is, *That from Ascension day, to Michaelmas, in every city 6 men shall keep watch at every gate, in every borough 12 men, every town 6 or 4 according to the number of the inhabitants, and shall watch the town continually all night, from the sun setting to the sun rising.* *13 Ed. 1. ft. 2. c. 4.* By the statute of Winchester.

This watch is to be set by the constable, and their power is this: *If any stranger do pass by them, he shall be arrested until morning, and if no suspicion be found, he shall go quiet; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff, until he be acquitted in due manner. And if they will not obey the arrest, they shall levy hue and cry upon them.* id.

Inhabitants] It hath been resolved, that a stranger, who is not an inhabitant, cannot hereby be compelled to keep watch 2 Haw. 80.

Deliver him to the sheriff] That is to the common gaol. 2 H. H. 96. By the constable.

2. But this watch only extends between *Ascension day* and *Michaelmas*; but there is another watch that may be kept by the constable *ex officio*, which may extend to other times; as by the *5 Ed. 3. c. 14.* for night walkers, and persons suspicious by night or day. 2 H. H. 97.

And although a constable is not bound to any precise time for this kind of watch, nor punishable if he omit it, barely for the omission, if he be ready upon occasion to do his office when required in these cases; yet it is in his power to hold such watches, as often as he pleases, and it is convenient and justifiable: and herein the watchmen are the ministers and assistants of the constable, and are under the same protection with him, and may act as he doth. 2 H. H. 97.

Yea it is holden, that every private person may by the common law arrest any suspicious night walker, and detain him till he give a good account of himself. 2 Haw. 80.

3. There is also another kind of watch, which is by authority of the justices of the peace, which also may be held at other times than the above statute of the *13 Ed. 1.* appoints; and the watch thus appointed hath the same power as either of the former: and this seems to be within the power of any one justice, by the first assignment in the commission; but the safer way, and more usual is, by order of sessions. *Lamb. 126.* 2 H. H. 97. *Dalt. c. 104.* By the justices.

Who shall
watch.

4. It seems to be agreed, that every inhabitant is bound to keep watch in his turn, or to find another. 2 *Haw.* 80.

But they are not compellable to watch at the will of the constable, but only when their turn cometh; which was the antient custom at common law. *Dalt. c.* 104.

And the watching and warding ought to be by men able of body and sufficiently weaponed. *Dalt. c.* 104.

And therefore a woman required to watch, may procure one to watch for her. *Comb.* 243.

Persons taken
by watchmen.

5. If a watchman take any one for suspicion of felony, he may inquire of his good name and fame, and if he finds him to be of good name and fame, he may let him go, without being guilty of an escape. *Dalt. c.* 159.

And if a person will not obey the arrest of the watchman, they may levy hue and cry upon him, that he may be taken; or else they may justify to beat him, for that he resisteth the peace and justice of the realm; and may also set him in the stocks for the same until the morning. *Dalt. c.* 104.

And the watchmen may deliver such persons to the constable, or may convey them to a justice, to be examined, and to be bound over or committed, until they be acquitted in due manner. *Dalt. c.* 104.

Indemnity of
watchmen.

6. A watchman hath a double protection of the law: 1. As an assistant to the constable, when the constable is present or in the watch; for so every man who is assisting to the constable in the execution of his office, hath the same protection that the law gives the constable. 2. Purely as a watchman set by order of law; and the law takes notice of his authority *sub eo nomine*, and therefore killing of a watchman in execution of his office, is murder. 2 *H. H.* 98. 3 *Inst.* 52. 9 *Co.* 66.

And if a watchman be killed in endeavouring to apprehend a burglar, his executors shall be intitled to 40 *l.* reward. 5 *Ann. c.* 31. s. 2.

Punishment for
not watching.

7. If any person refuse to watch in his turn, at the commandment of the constable, he may present the default at the assizes or sessions, or may complain thereof to any justice of the peace, who may bind the offender to the good behaviour, and so over to the next sessions. *Dalt. c.* 104. And there he may be indicted. 2 *Haw.* 80.

But here it is to be noted, that in *Cro. El.* 204. which Mr. Dalton cites for his authority in this matter, it is not said, that the justice may bind him to the good behaviour, but only thus. ————— that he may inflict punishment upon the refuser.

Watch.

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Warrant for keeping of Watch.

Dublin. { To the constable of the hundred of — in the said
 { county.

AT a general quarter-sessions of the peace holden at — in and for the said county, before us — esquires, justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, you are hereby required forthwith to issue your warrants to the several petty constables within your said hundred, that they do cause watch to be kept by night, and ward by day, with able men, within and throughout their respective constablewicks, from the — day — now next ensuing, unto the — day of — then next following; and that they do apprehend, or cause to be apprehended, all rogues, vagabonds, and other wandering, idle, and disorderly persons, and carry them before some of his majesty's justices of the peace in and for the said county, to be examined and further dealt withal according to law. Given under our hands and seals, the day and year first above written.

Commitment of a person apprehended by the watch.

— { To the constable of — and to the keeper of the house of
 { correction at —

WHEREAS A. O. was this day brought before me J. P. esquire, one of the justices of our lord the king, assigned to keep the peace within the said county, the said A. O. having been taken last night by the watch set by the constable of — and charged with wandering abroad at unseasonable times of the night, and also with other disorderly behaviour, and not now giving a good account of himself before me: These are to require you the said constable of — to convey the said A. O. to the said house of correction at — aforesaid, and to deliver him to the keeper thereof, together with this warrant. And I do hereby require you the said keeper of the house of correction aforesaid, to receive the said A. O. into your custody in the said house of correction, and him there safely to keep until the next general quarter-sessions of the peace to be holden in and for the said county, allowing unto him in the mean time such maintenance as he shall deserve by his labour; and have you him then there, together with this precept. Given under my hand and seal, at — in the said county, the — day of — in the — year of the reign of —.

In-

Indictment for not watching.

THE jurors for our lord the king upon their oath present, that A. O. of _____ in the said county, yeoman, on the _____ day of _____ in the _____ year of the reign of _____ and long before, and always after unto the day of the taking of this inquisition, was, and yet is, an inhabitant of the town of _____ aforesaid, in the county aforesaid, and that the said A. O. then and there, to wit, on the said _____ day of _____ in the year aforesaid, at _____ aforesaid, in the county aforesaid, was duly summoned in his turn to watch with the constable of _____ aforesaid, in the night of the same day; nevertheless the said A. O. his duty in that behalf not regarding, did not watch in the said night of the same day, in the year aforesaid, nor in any part of the said night, with the said constable at _____ aforesaid, in the county aforesaid, but did then and there utterly refuse so to do, and wilfully and obstinately therein did make default; in contempt of our said lord the king, and of his laws, and against the peace of our said lord the king, his crown and dignity.

Weights and measures.

THE particular weights and measures of different sorts of goods, may be seen under their respective titles: and what is treated of here, is touching weights and measures in general.

I. Of the different kinds of weights and measures.

II. Standard of weights and measures to be kept in market towns.

III. Mayors and other officers to seal and regulate measures.

IV. Punishment of mayors and other officers for omitting their duty.

I. Of the different kinds of weights and measures.

Divers weights.

1. Notwithstanding the many statutes which have enacted, that there shall be but one weight and one measure, throughout the realm, there always have been, and still are two kinds of weights used, and both warrantable; the one by law, and the other by custom; but they are for several sorts of wares or commodities: for there is *troy weight* and *avordupois*. Dalt. c. 112.

Troy weight.

2. *Troy weight* is by law; and thereby are weighed silk, gold, silver, pearl, and precious stones. And this hath to the pound 12 ounces. Dalt. c. 112.

3. *Aver-*

3. *Averdupois* (which in *French* is as much as to say to have full weight) Averdupois weight. is by custom, yet confirmed by statute; and thereby are weighed all kind of grocery wares, drugs, butter, cheese, flesh, wax, pitch, tar, tallow, wool, hemp, flax, iron, steel, lead, and all other commodities which bear the name of garble, and whereof issueth a refuse or waste; and also bread, and this hath to the pound 16 ounces; and 12 pounds over are allowed to every hundred. *Dalt. c. 112.*

4. And no less do the measures also differ in different places. Thus Mr. *Dalton* observes, that the bushel of corn in one place is greater than in another; and it seems, he says, that the custom of the place is to be observed: yet he makes a *query* upon it, because it is contrary to the great charter, and divers other statutes; and custom or prescription against a statute seemeth not good. *Dalt. c. 112.* Divers measures.

II. Standard of weights and measures to be kept in market towns.

In every city, borough and market town, a common balance shall be, with common weights sealed, and according to the standard of the exchequer, upon the common costs of such city, borough, or market town, in the keeping of the mayor, or constable; on pain of 10*l.* for such city making default, borough 5*l.* and market town 40*s.* Standard to be kept in market towns at which all may weigh.

At which balance all the inhabitants may freely weigh without any thing paying; taking nevertheless of foreigners, for every draught within the weight of 40*lb.* a farthing, and for every draught betwixt 40*lb.* and 100*lb.* an halfpenny, and for every draught betwixt 100*lb.* and 1000*lb.* a penny.

And justices of the peace, mayors, bailiffs, and stewards of franchises may inquire of offenders against this ordinance, and do execution of them that be found faulty. 8 *H. 6. c. 5.* 11 *H. 7. c. 4.*

III. Mayors and other officers to seal and regulate measures.

By the act, 7 *W. c. 24.* In every county, town, city, liberty, franchise, and market town, shall be kept at the proper costs and charges of each county, city, liberty, franchise, and market town respectively, in the custody of the sheriff of such county, and of the mayor, bailiff, sovereign, seneschal, or steward, of any liberty or manor, or other chief magistrate residing in such city or market town, one barrel, half barrel, bushel, peck, and gallon which shall be first measured by the said standards in the exchequer, and shall be severally sealed or marked on the brim, with the crown and letters of his majesty's name, and with such other mark as the lord high treasurer, or the vice treasurer, or deputies shall think fit;

And such measures in the custody of the said sheriffs, mayors, bailiffs, sovereigns, seneschals, or stewards, of any liberty or manor, or other head officers being measured or marked by the high treasurer, or the vice treasurer, or deputies, shall be the standards for such county, city, liberty, or franchise or market town respectively.

The

The said sheriffs, mayors, &c. and other officers in whose custody such standards are appointed to remain, shall have power to measure and compare all such barrels, half-barrels, bushels, pecks, and gallons, as shall be brought to them to be measured or marked.

Measures to be sealed.

And if they shall find the measure so offered to be agreeable to the said measures marked by the high treasurer, &c. the said sheriffs, mayors, &c. or other chief officers, shall mark the measures so brought to them, on the rim or edge of them, with the crown and letters of his majesty's name, and also with a mark or brand to be appointed by each county, city, &c. and for the measuring and marking of each measure shall be paid by the persons bringing the said measures to be marked, six pence.

Fee for the same.

Weights to be examined.

And by the 4 *Ann. c. 14.* There shall be also provided in every city and town that are counties of themselves, at the charge of the said cities and towns, and also in every county at the charge of the said counties, a set of just weights made of brass, and tried, sized, and made equal with the weights aforesaid remaining in her majesty's court of exchequer, and shall be sealed by the officer in whose custody the said standard weights do remain, with the same seal wherewith the said standard weights are sealed, which several weights shall remain in the custody of the mayor in each city and town that are counties by themselves to be the standard weights, by which all the weights in the said cities and towns are to be tried and regulated.

IV. Punishment of mayors and other officers for omitting their duty.

By the act 7 *W. c. 24.* If any person who hereby hath power to measure and mark any barrel or other measure brought to him, shall mark or allow any barrel or other measure which shall contain more or less than the said standards remaining in his custody, the person so doing shall forfeit for every such barrel or other measure so sealed or allowed by him fifty pounds, the one moiety to the king, and the other moiety to him that will sue for the same, to be recovered by action in any of his majesty's courts of record at *Dublin.* *f. 6.*

And by the 4 *Ann. c. 14.* In case the mayor for the time being of any city and town that is a county of itself, shall neglect to provide a set of brass standard weights, or shall neglect to appoint and swear a weighmaster, or shall neglect to provide a true balance or beam with scales and weights sufficient and convenient for the weighing of goods between buyer and seller, every such mayor or other person as aforesaid, shall forfeit for every month that any of the particulars aforesaid shall be wanting forty shillings; the one half to be to the poor of the parish of the city or town where such forfeiture shall happen, the other half to such person as shall inform and prosecute for the same as herein after directed, *f. 5.*

And in case there shall not be a set of brass standard weights provided in each county at large in this kingdom in manner aforesaid, the justices of assize at every assizes, and the justices of the peace at their quarter sessions shall inquire thereof, and shall fine the said county in any sum not exceeding five pounds, and estreat the same into her majesty's court of ex-

Weights and measures.

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exchequer, and so continue every assizes and sessions until the said weights shall be provided.

In case the chief magistrate of any borough or market town, or the persons to whom the toll and customs of any market town not being a corporation doth belong, shall neglect to appoint and swear a weighmaster, or shall neglect to provide a true balance or beam with scales and weights sufficient for the weighing of all goods, every such chief magistrate of any borough or market town being a corporation, or the persons to whom the toll or customs of any market town, being or not being a corporation of itself, doth belong, shall forfeit forty shillings for every month that any of the particulars aforesaid shall be wanting; the one half to be to the poor of the parish, and the other half to the persons that shall inform of and prosecute the same in manner as is hereafter directed.

It shall be lawful for the justices of the assize in their circuits, and the justices of the peace in their quarter-sessions, to inquire after all offences against this act, and determine the same, and to issue their respective warrants for levying the forfeitures and penalties in this act mentioned, to be disposed of, the one moiety to the poor of the parish, and the other moiety to such person as shall inform or prosecute for the same.

s. 8. Selling by false weights and measures is also an offence at the common law, and consequently may be punished by indictment, fine and imprisonment.

Wife.

1. *T. 2 G. 2. King and his wife against Jones.* The plaintiff *Jones* declared against *Judith Parnell*, upon several promises. She by the name of *Judith King* appears by attorney, and pleads *non assumpsit*. And after a verdict for the plaintiff, she and *Edward King* bring a writ of error, and assigned for error, that she has appeared and pleaded as a feme sole, whereas at the time of her appearance and plea she was married to the said *Edward King*. But by the court, This is to abate the plaintiff's writ by the act of the defendant, which was never allowed; we must take it, that at the time of bringing the action, the defendant was a feme sole, because they pretend to carry it back no farther than the appearance. And plaintiffs would be in a fine condition, if after they have arrested a woman, she shall be allowed to overthrow their proceedings by a subsequent marriage. And the judgment was affirmed. *Str. 811.*

Woman marrying pending an action.

2. A wife, or feme covert, is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, in company with, or by coercion of her husband. *1 Haw. 2.*

Committing offences with her husband.

But if she commit a theft of her own voluntary act, or by the bare command of her husband; or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole, because of the odiousness and dangerous consequence of these crimes. *1 Haw. 2. 1 H. H. 47. Dalt. c. 157.*

5 F

And

And the coercion of the husband is only a presumption till the contrary appear; for if upon the evidence it can clearly appear, that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she seems to be guilty as well as the husband. 1 H. H. 516.

Accessory in receiving her husband.

3. A wife shall not be deemed accessory to a felony for receiving her husband who has been guilty of it; as her husband shall be for receiving her: because she is under the power of her husband, and she is bound to receive him. 1 Haw. 2. 1 H. H. 47.

Keeping a bawdy house.

4. But a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 Haw. 2.

Wife to suffer corporally; but the husband to pay the forfeiture.

5. And generally, a married woman shall answer as much as if she were sole, for any offence not capital, against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for an offence to which he is no way privy. But if a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same (as he may generally to any suit for a cause of action given by his wife), and shall be liable to answer what shall be recovered thereupon. 1 Haw. 3.

Eloping.

6. If a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower. 13 Ed. 1. st. 1. c. 34.

M. 12 G. Morris and Martin. Action for meat and other things provided for the defendants wife. The defendant proved she went away from him with an adulterer. Raymond Ch. J. held, that the husband should not be charged for necessaries for her, tho' the plaintiff who provided for her had no notice; and he said Ch. J. Holt always ruled it so. Str. 647.

T. 12 G. Mainwaring and Sands. In an action against the husband for a laced head sold to the wife, it was proved, that the wife lived from her husband in adultery, and that she told the plaintiff she had a husband, but that signified nothing, for she would pay him herself. Raymond Ch. J. held the defendant not chargeable, and said he should have ruled it so, if there had been no actual notice, which only strengthened the case. Str. 706.

T. 4 G. 2. Child and Hardyman. Action for linen sold to the defendant's wife. Upon non assumpsit, the delivery was proved. And the defendant proved that she had lived in a very lewd manner; one Mr. Nott frequently coming to her at her husband's house, and they were locked up together in a bedchamber; and other indecencies passed between them. And it was also proved, that she several times went to the house of this Nott, a gentleman in Wiltshire, who lived within three miles of the defendant's house. It did not appear farther, than that he disliked her going and staying at Mr. Nott's

Nott's. But under these circumstances, the husband and wife continued to live together. Afterwards, she went away from him, and went to *Marthorough*, where she resided for some time; but after the leaving her husband's house, it did not appear that she ever saw Mr. *Nott*, or lived in a lewd manner. After some time, she sent *Lucas* an attorney to her husband, to desire that he would receive her again; the husband told him, that if she came again, she should never sit at the upper end of his table, nor have the government of the children, but should live in a garret. Then *Lucas* proposed to him, to make her an allowance, and proposed about 80 or 100 l. a year, he being worth about 5 or 600 l. a year. But that was not complied with; and afterwards she came to *London*, and bought the linen, to the amount of 53 l. By *Raymond Ch. J.* If a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband is not bound. And this hath been so adjudged in 2 or 3 cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he doth not absolutely refuse to receive her again; but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit. *Str.* 875.

M. 18. G. 2. Bolton and Prentice. In *assumpsit* for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again. After this the defendant and his wife cohabited together for a year; when, without any cause appearing, he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They distinguished this case from the case of *Manby and Scott*, 1 *Sid.* 109. for there the wife was guilty of the first wrong in eloping. *Str.* 1214.

7. Of women carried away (*viz.* violently, or against their wills, 2 *Inst.* 435.) with the goods of their husbands, the king shall have the suit for the goods so taken away, 13 *Ed. 1. st. 1. c. 34.* That is, it shall be felony. And so, if any man takes another man's wife, with her husband's goods, against the husband's will, this is also felony. *Dalt. c. 157.*

Carrying her away with the husband's goods.

Wife taking the husband's goods.

Guilty of forcible entry.

Guilty of slander, trespass, or assault.

8. But a wife herself cannot feloniously take her husband's goods; and tho' she so takes her husband's goods, and delivers them to a stranger, yet it is no felony in the stranger. *H. Pl. 65. 1 Haw. 93.*

9. A married woman, by her own act (but not in respect of what is done by others at her command, because all such commands of hers are void) may commit a forcible entry or detainer; and upon the justice's view of the force, she shall be imprisoned therefore, and she may be fined in such case; but such fine set upon the wife, shall not be levied upon the husband; for the husband shall never be charged for the act or default of his wife, but when he is made a party to the action, and judgment given against him and his wife. *Dalt. c. 126. 9 Co. 72. 11 Co. 61.*

10. Likewise if she shall commit any riot, or do any trespass or other wrong, she is punishable for it; and for a trespass done by the wife, or for a scandal published by her, the action lieth against both the husband and wife, and there the husband is chargeable to the damages or fine, because he is party to the action and judgment; but if a wife without her husband be indicted of a trespass, riot, or any other wrong, there the wife shall answer, and be party to the judgment only; and in such case, the fine set upon the wife shall not be levied upon the husband; yet after the husband's death, such damages or fines shall then be levied of the wife herself; and as for imprisonment, or other corporal pain, it shall be inflicted upon the wife only, and not upon the husband for his wife's act or default. *Dalt. c. 139.*

M. 19 G. 2. Finch and his wife against *Duddin* and his wife. In an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was only taken in execution. She moved to be discharged, but upon affidavits of endeavours to take the husband, and it not appearing there was any design to screen him, the court refused it, on the authority of *Pitt and Meller*. *Str. 1237.*

Which case of *Pitt and Meller*, *T. 15 G. 2.* was thus: In trover against both, and judgment and execution against both; the wife petitioned to be discharged out of custody; which the court refused, unless it could be shewn, that there was fraud and collusion between the plaintiff and the husband, to keep her there. *Str. 1167.*

M. 10 G. Tarrant and *Mawr*. The wife libelled in the spiritual court for calling her whore, and there being proceedings likewise for defamation against her by the other, the two husbands enter into an agreement to stay proceedings on both sides: and upon one of the wives going on, the husband moved for a prohibition; but it was denied: for by the court, the suit is by the wife, to recover her fame, and it is not in the power of the husband to restrain her. *Str. 576.*

Receiving stolen goods.

11. If a woman receive stolen goods into her house, knowing them so to be; or shall lock them up in her chest or chamber, her husband not knowing thereof; if her husband, so soon as he knoweth thereof, do forthwith forsake his house, and her company, and make his abode elsewhere, he shall not be charged for her offence; whereas otherwise, the law will impute the fault to him, and not to her. *Dalt. c. 157.*

12. A prosecution for conspiracy is not maintainable against a husband and wife only ; because they are esteemed but as one person in law, and are presumed to have but one will. 1 *Haw.* 192. Guilty of conspiracy with her husband.

13. If a woman who is a servant shall marry, yet she must serve out her time, and the husband cannot take her out of her master's service. *Dalt.* Woman servant marrying.

14. Also if a married man and his wife do bind themselves to serve, they shall be compelled to serve, according to their covenant or agreement. *Dalt. c.* 58. Wife hiring to be a servant.

15. If the wife maliciously kill her husband, it is petty treason ; but if the husband maliciously kill his wife, it is but murder. *Dalt. c.* 142. Killing her husband, petty treason.

16. Husband and wife cannot be witnesses for one another ; nor regularly against one another. 2 *Haw.* 431. Evidence for or against her husband.

But a wife may demand surety of the peace against her husband threatening to beat her outrageously, and a husband also may have it against his wife. 1 *Haw.* 127.

And in other criminal cases, the wife may be a witness against her husband, where she is the party grieved ; but not in civil cases. *Dalt. c.* 164.

17. A wife cannot be bound herself by recognizance, but her sureties only. *Dalt. c.* 117. Cannot be bound by recognizance.

18. She may surrender a lease in the court of chancery or exchequer, in order to renew the same. 29 *G. 2. c.* 31. May make a surrender.

19. *H. 1735.* In the chancery. *Heard and Stamford.* The husband, as such, is not chargeable in a court of equity, any more than at law, with the debts of his wife after her decease ; no not even tho' he had a large fortune with her : as on the other hand he is, during the coverture, liable to all her debts, altho' he got nothing with her. *Cas. Talb.* 173. 3 *Peere Will.* 409. Husbands not liable to the wife's debts after her death.

Witchcraft.

BY the act, 28 *El. sess.* 2. *c.* 2. If any person use any invocations or conjurations of evil spirits for any purpose ; or if any person shall use any witchcraft, enchantment, charm, or sorcery, whereby any person shall be killed or destroyed, as well every such offenders in invocations or conjurations as is aforesaid, their aydours and counsellors, and also every such offenders in witchcraft, enchantment, charm, or sorcery, whereby the death of any person doth ensue, their aydours and counsellors being of the said offences convicted and attainted, shall suffer death as felons, and shall lose the privilege and benefit of clergy and sanctuary.

If any person shall use any witchcraft, enchantment, charm, or sorcery, whereby any person shall be wasted, consumed, or lamed in their body or member, or whereby any goods of any person shall be destroyed or impaired, such offenders their counsellors and aydours being thereof convicted, shall for their first offence suffer imprisonment by the space of one whole year without bail or mainprize, and once in every quarter of the said year, shall in some market town upon the market day, or at such

Witchcraft.

such time as any fairs shall be kept there, stand openly upon the pillory by the space of six hours, and there shall openly confess their error and offence.

And for the second offence being convicted or attainted shall suffer death as a felon, and shall lose the privilege of clergy and sanctuary, saving to the wife of such person her title of dower, and also to the heir and successors of such person, and to all other persons, their heirs and successors, their rights, &c. of any estate of inheritance, &c.

If any person shall take upon them by witchcraft, incantment, charm, or forcery, to tell in what place any treasure of gold or silver might be found in the earth or other secret places, or where goods or things lost or stolen should be found, or shall practise any forcery, incantment, charm, or witchcraft, to the intent to provoke any person to unlawful love or to hurt or to destroy any person in his or her body, member, goods, or chattels, such persons so offending, and being thereof convicted, shall for the said offence, suffer imprisonment by the space of one whole year without bail or mainprize, and once in every quarter of the said year shall in some market town upon the market day, or at such time as any fair shall be kept there, stand openly upon the pillory by the space of six hours, and there shall openly confess his or her error and offence.

And if any person being once convicted of the same offence do afterwards commit the like offence, being thereof the second time convicted as is aforesaid, shall forfeit unto the queen, &c. all his goods and chattels, and suffer imprisonment during life.

But by the *Br. ft. 9 G. 2. c. 5.* No prosecution, suit, or proceeding, shall be commenced or carried on against any person for witchcraft, forcery, incantment, or conjuration, or for charging another with any such offence, in any court whatsoever. *f. 3.*

Women.

Concerning women considered as *wives*, or *femes covert*; see title **Wife**.

Concerning women having two husbands, or men two wives; see title **Polygamy**.

Concerning the ravishment of women; see title **Rape**.

For clandestine marriages, and counterfeiting marriage licences and registers; see title **Marriage**.

1. **I**F any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, he shall be guilty of felony without the benefit of clergy. *18 El. c. 7.*

Taking a woman by force.

2. None shall take by force any maiden within age (that is, the age of 12 years, being the age of consent to marriage, *2 Inst. 182.*) by her own consent nor without; nor any wife or maiden of full age, nor any other woman against her will; on pain of imprisonment for two years, and after, fine at the king's will. *3 Ed. 1. c. 13.*

3. *If*

3. If any person take by force, or otherwise, any woman sole, having any substance of lands, tenements, or moveable goods, and inforce her before she be set at liberty, to bind herself to him by statute or obligation; such bond shall be void. 31 H. 6. c. 9. Forcing her to become bound.

4. Whereas women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, are oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to other by their assent, or defiled, — it is enacted, that what person that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abeting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such misdoers, takers, and procurators to the same, and recitors, knowing the said offence, shall be adjudged as principal felons. 3 H. 7. c. 2. And by the 11 J. c. 3 Benefit of clergy is taken away from the principals, procurers, and accessaries before. The offence commonly called stealing an heiress.

Upon the face of which said statute of the 3 H. 7. these things are required to make the offence felony; 1. That the maid, wife, or widow, have lands, or tenements, or moveable goods, or be an heir apparent. 2. That she be taken away against her will. 3. That the taking was for lucre. And 4. That she be married to the misdoer, or to some other by his consent; or be defiled (that is, carnally known.) For if these concur not, and be so laid in the indictment, the misdoer is not a felon within this statute, but otherwise to be punished. 3 Inst. 61. 1 Haw. 110.

The said act makes not only the takers, but the procurers, and abettors of the felony, and receivers of the woman wittingly, knowing the same to be all principal felons; the like whereof lord Coke says he hath not found in any other statute that he remembers. But by a construction of the common law, they that receive the misdoers, and not the woman, are accessaries only. 3 Inst. 61, 62.

But those who are only privy to the marriage, but no way parties to the forcible taking away, or consenting thereto, are not within the statute. 1 Haw. 110.

It is no manner of excuse, that the woman at first was taken away with her own consent; because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. 1 Haw. 110.

Also, it is not material, whether a woman so taken contrary to her will, be at last married or defiled with her own consent, or not; if she were under the force at the time. 1 Haw. 110.

In *Fullwood's case*, M. 13 C. it was resolved, that the woman taken away and married, may be sworn and give evidence against the offender, who so took and married her, tho' she be his wife *de facto*. 1 H. 661.

Taking a woman under 16.

5. If any person above the age of 14 years, shall unlawfully take or convey, or cause to be taken or conveyed, any maid or woman child unmarried, being within the age of 16 years, out of the possession and against the will of her father, or mother, or guardian; he shall suffer two years imprisonment, or pay such fine as shall be assessed by the court, half to the king, and half to the parties grieved. 10 C. 1. §. 3. c. 17. §. 2.

H. 15 G. 2. K. against Cornforth and others. The court granted an information against the defendants, for taking away a *natural* daughter under 16, under the care of her putative father; being of opinion it was within this statute. Str. 1162.

And if any person shall so take away, or cause to be taken away, and deflower, any such maid or woman child; or shall against the will or knowledge of the father, or if he is dead, of the mother having tuition of such child, contract matrimony with her by letters, messages, or otherwise; he shall be imprisoned for five years, or pay such fine as shall be assessed by the court, half to the king, and half to the parties grieved. §. 3.

And if any woman child or maiden, being above the age of 12 years, or under 16, shall consent or agree to such person so making such contract of matrimony; the next of kin to her shall have, hold, and enjoy her lands during the life of the person so contracting. §. 5.

And by the 6 Ann. c. 16. If any person above the age of fourteen years, by fraud, flattery, fair promises, or other indirect means, shall secretly allure and convey away, any maid or woman child, having substance in lands or goods, or being heiress to her ancestor, and within the age of eighteen years, from the custody or governance of the father, or mother, or guardians of such maid or woman child, against the will of the father or mother, or of such persons who shall then have the guardianship, or of such other persons as shall then lawfully have the keeping, education or government of such maid or woman-child, and shall contract matrimony with such maid or woman-child with the consent of such child, the said persons so taking away and marrying the said maid or woman-child, without the consent of the parent or guardian, and in case there be no parent or guardian appointed, then of the lord chancellor, lord keeper, or commissioners of the great seal, and be thereof convicted, shall suffer imprisonment for three years, and shall be adjudged to be disabled to have or take any use or benefit of any the estate real or personal, to which such maid or woman-child, or any persons in trust for such child at the time of such marriage, or at any time after shall be seized of, or intitled unto.

If any maid or woman be carried away by force against her consent, and after be married or defiled by such persons who carried her away, or by any other person, by their assent or procurement, whether such marriage or defilement be with or without the consent of such maid or woman, every such person so marrying or defiling such maid or woman, and the aiders and procurers of such forcible taking away of such maid or woman, and all as well principals as accessaries before such fact committed, shall lose the benefit of clergy, and shall be adjudged to be felons, and shall suffer death without benefit of clergy,

If

If any persons being principal or accessory before such offences committed, shall be indicted and arraigned for the taking away of any such maid or woman by force against her consent, and marrying or defiling such maid or woman as aforesaid, and upon their respective trials shall stand mute, or make no direct answer or challenge peremptorily above the number of twenty, they, in every such case shall suffer death, without the benefit of clergy.

Also, by the 19 G.2 c. 13. If any maid or woman be carried away by force against her consent with an intent to marry or defile such maid or woman, contrary to the intent of the act (6 Ann. c. 16.) every person so carrying away such maid or woman, and the aiders and procurers of such forcible carrying away, and all as well principals as accessories before such fact committed shall be adjudged felons without benefit of clergy or of the statute.

6. In an appeal by a woman, the appellee cannot wage battle, but must put himself upon his country. 2 Haw. 427. Appeal by a woman.

Peereffes shall be tried as peers, for treason or felony. 20 H. 6. c. 9.

7. Women upon standing mute, are liable to *pain fort & dure*, as men are. 2 Haw. 331. Peereffes how to be tried.
Woman standing mute.

8. A woman being convicted for an offence, for which a man may have his clergy, shall suffer the same punishment as a man should suffer, that has the benefit of his clergy allowed; that is, shall be burnt in the hand, and further kept in prison as the court shall think fit, not exceeding one year. 9 W. c. 32. s. 6. Benefit of clergy.

But she shall have the benefit of the said statute but once. 9 Ann. c. 6. s. 7.

9. The judgment against a woman, in case of high treason is, not the same as against a man traytor, to be hanged, cut down alive, have the bowels taken out, and the body quartered; but to be drawn to the place of execution, and there burned: Judgment in treason and felony.

And this also is the judgment against a woman, in case of petit treason; whereas the judgment against a man for petit treason is, that he shall be hanged:

But in case of felony, the judgment is the same against both man and woman, to be hanged by the neck till dead. 2 Haw. 444.

10. It is clear, that if a woman quick with child be condemned either for treason or felony, she may allege her being with child in order to get the execution respited, and thereupon the sheriff shall be commanded to take her into a private room, and to impannell a jury of matrons to try and examine, whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. But it is agreed, that a woman cannot demand such respite of execution, by reason of her being quick with child, more than once. 2 Haw. 464. Plea of pregnancy.

11. Women are not obliged to appear at the torn or leet. 2 Haw. 57. Attending the torn and leet.

12. Mr. Hawkins seems to be of opinion, that a custom of the inhabitants serving the office of constable by turns, is good; and that when it comes to the turn of a woman inhabitant, she must procure one to serve for her. 2 Haw. 63. Serving the office of constable.

Pulling down
hedges of
ground im-
proved.

1. **I**T is proper to insert here in the first place, a clause in the statute of the 13 Ed. 1. st. 1. c. 46. both upon its own account, and its being referred to afterwards by subsequent statutes; viz. *Where sometimes it chanceth, that one having a right to approve, doth then levy a dyke or an hedge, and some by night, or at another season, when they suppose not to be espied, do overthrow the hedge or dyke, and it cannot be known by verdict of the assize or jury, who did overthrow the hedge or dyke, and men of the towns near will not indict such as be guilty of the fact; the town near adjoining shall be distrained to levy the hedge or dyke at their own cost, and to yield damages.*

One having a right to approve] Forasmuch as the lord ought to divide the parts of the common improved, by the hedge, ditch, or other defence; now this clause provideth, that if persons unknown, either in the night or otherwise, so secretly prostrate the ditches, hedges, or other fences, as the lord cannot know against whom to bring his assize or other action; and the men of the towns next adjoining thereunto round about do not indict the misdoers of the fact, those next towns round about shall be distrained to make the hedge or ditch at their own cost, and yield damages to the lord. 2 Inst. 476.

Indict.] That is, indict him at the king's suit, either of a riot, force, or trespass: but here it is demanded, what time have the next town round about adjoining to indict the misdoers, seeing there is no time appointed; and the answer is, that seeing no time is appointed, the law doth appoint (as in many cases it doth) a year and a day for the indicting of the misdoers; and by the indictment the lord shall know against whom to bring his action. 2 Inst. 476.

The towns near adjoining shall be distrained to levy the hedge or dyke, at their own cost, and to yield damages] If the bordering towns do not within a year and a day indict the misdoers, then shall the lord or other party grieved bring his action upon this branch, against the towns bordering round about the town wherein the fact was done, and judgment shall be given, that they shall at their proper costs make the ditch or hedge, and yield damages; and after judgment given, they shall be distrained to make the hedge or ditch. 2 Inst. 477.

Robbing or-
chards, break-
ing hedges,
pulling up fruit
trees, spoiling
wood growing.

4. Every person who shall rob any orchards or gardens; or break or cut any hedge, pales, rails, or fence; or dig, or pull up, or take up any fruit tree or trees in any orchard, garden, or elsewhere, to the intent to take and carry the same away; or shall cut or spoil any woods or underwoods, poles, or trees standing (the same not being felony by the laws of this realm); every such person, his procurers and receivers, knowing the same, being thereof convicted by confession, or oath of one witness, before one justice (or mayor) shall give to the party such recompence and satisfaction for damages, and within such time, as the said justice shall appoint; and the same to be only for the first fault: and if such offender shall be thought by the

the justice not able, or do not make such recompence, then he shall commit him to the constable where the offence shall be committed, or the party apprehended, to be whipped. And for every such offence for which the offender shall be estfoons committed in form afore limited, the person so offending to receive the said punishment of whipping. 10 C. 1. f. 2. c. 23.

And if the constable shall not by himself, or some other execute upon the offender the said punishment, the justice may commit him to the common gaol till he comply. f. 2.

Rob any orchards] Robbing of orchards doth not seem to be comprehended in any other statute, so that the punishment thereof is restrained to this statute: but the other offences abovementioned are further punishable by other statutes hereafter following.

Cut or spoil any woods or underwoods, poles, or trees standing] E. 2 Ann. 2. & Burnaby. The defendant was convicted upon this statute, for cutting down several trees called lime trees, and damages given of 20 l. It was objected, that the number of the trees ought to have been set forth, because this ought to be the measure of the damages; and if an action should be brought for the trespass, this conviction cannot be pleaded in bar, for it will not appear that the conviction was for the same trees; and therefore the number and quantity ought to be mentioned expressly in the conviction, as well as in an action for the trespass. And for this cause the court was of opinion that the conviction was ill. Comyns. 131.

The same not being felony by the laws of this realm] The distinction in which case seemeth to be this; if they be any way annexed to the freehold, as trees growing, or apples growing upon the trees, then the taking and carrying them away is not felony, but only a trespass, for a man cannot steal part of the freehold; but if they be severed from the freehold, as wood cut, or apples gathered from the trees, then the taking of them is not a trespass only, but felony.

7. If any person shall either by day or night, cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil, or carry away, any wood springs, poles, wood, tops of trees, underwoods or coppice woods, thorns or quicksets, without the consent of the owner, or of the person chiefly intrusted with the care and custody thereof; or shall break open, throw down, level, or destroy any hedges, gates, posts, stiles, railing, walls, fences, dikes, ditches, banks, or other inclosure thereof; the owner may have such satisfaction and recompence from the inhabitants of the parishes, towns, hamlets, villages, or places, joining on such wood springs or wood grounds, and recover such damages against such place or places, and in the same manner and form as by the (above recited) act of the 13 Ed. 1. f. 1. c. 46.

Destroying wood growing or the inclosures thereof.

And by the 10 W. 3. c. 12. No person shall strip bark from any growing or standing tree, or shall cut, make, or sell any goads made of oak; or shall cut or place at their doors or elsewhere, any green trees,

commonly called *May* bushes; or shall keep any goats, other than in mountain, under penalty of forfeiting the same, and of paying twenty shillings for every such offence, to be levied as herein is after directed; the one moiety thereof to the informer, and the other moiety to the poor of the parish where such person, so offending, shall be apprehended. *f. 13.*

Whereas the bark of standing trees has been usually stript for tanning hides of stolen cattle, in bogs and other private places; and for dying linen yarn, thread, and skins, by persons in private houses; for remedy whereof, for the future, no brogue-maker or other person, other than publick and known tanners, shall tan or keep in lime or other pits, in order to tanning, any hides or skins. *f. 14.*

And no spinner, weaver, skinner, or other person, not being a known dyer, and exercising the trade of a dyer, shall colour or dye any linen yarn, thread, skins, or gloves, with the bark of any tree, or of such colour as is usually dyed with the bark of any tree growing in this kingdom, under the pain of such fine, not exceeding forty shillings for any one offence, as the justices herein after appointed shall impose.

Every person, who, between sun-rising and sun-setting, shall saw or cut down any tree, not being thereunto authorized by the person who has a right to such tree, shall, for every such offence, forfeit to the owner treble the value of such trees, the same to be ascertained by the justices in their public sessions, and shall pay as a fine for every tree so cut or grubbed up, such sum not exceeding forty shillings, nor under five shillings, as to the said justices shall seem reasonable. And in case the said persons shall refuse, or not be able to answer the damages and pay the fine, the said justices, in open sessions, shall, by warrant under their hands and seals, commit such persons to the house of correction, for any time not exceeding or under three months, there to remain at hard labour, and having due correction. *f. 15.*

Where any person shall after sun-setting, and before sun-rising, saw, cut down, or grub up, any tree, such persons shall by the next justice of the peace, be committed to the county gaol as a felon, and shall, being thereof convicted, suffer all the penalties of felony. *f. 16.*

All penalties and fines incurred and to be levied by virtue of this act, shall be levied by distress and sale of goods, if need be, or by committal of the person where no distress can be found, by warrant under the hand and seal of two justices; and all fines and forfeitures so levied, and not hereby otherwise disposed of, shall be applied to the encouragement of the linen and hempen manufactures, and for defraying the necessary charge of the several sessions, the same to be disposed of to the uses aforesaid, according to the directions of the said justices, which shall be made by them in open sessions. *f. 25.*

Also by the 4 *Ann. cap. 9.* No person shall make or use in plowing, drawing of timber, or other work, or in wattling the walls of houses or cabbins, or out-buildings, any kind of gadds or wyths of oak, ash, birch, hazel, or other tree; and any person that shall offend herein, and shall be thereof convicted at the assizes or quarter sessions held for that county, shall forfeit a sum not exceeding twenty shillings, to be levied by warrant from the court where the matter shall be tried or determined, the one moiety whereof to be to the informer, and the other moiety to the poor of the parish where the offence is committed. *f. 9.*

If any person unlawfully and without consent of the owners or possessors, shall take, cut, or spoil any kind of wood or underwood, poles, or young trees, clap-boards, barrel-staves, shingles, gadds, wyths, wattles, willows; or shall dig or pull up any fruit trees or other trees, or break or cut any hedge, pales, rails, or fence; every such person, being thereof convicted according to the directions of the act 10 *Car.* 1. *sess.* 2. *cap.* 23. shall, over and above the satisfaction to be made to the party grieved, pay to the poor of the parish where such offence shall be committed, such sum not exceeding ten shillings, as such justice of the peace or chief magistrate shall judge meet, to be levied by distress and sale of the offenders goods, by warrant of such chief magistrate or justice of the peace. *f.* 11.

Provided, that where the satisfaction to be made to such party grieved, shall, in the judgment of such justice of the peace or other chief magistrate, be judged to amount to more than ten shillings, every such justice and chief magistrate shall bind such offender to the next quarter sessions of the peace, to be held for such county or place, who are hereby impowered to make such order for recompence of such party grieved, and payment of such sum to the poor of the parish as aforesaid, and for levying them by distress and sale of the offenders goods, as they shall think meet. *f.* 12.

And in case such justice or chief magistrate shall find that such offender is unable to make satisfaction, and pay such sum to the poor of the parish as aforesaid, or the offender shall not pay the same, such justice and chief magistrate respectively, shall, for the first offence, commit such offender to the house of correction, for any time not exceeding one month, or shall order such offender to be publicly whipt by the constable or other officer, at the next market town or place, on the next market day, as to such justice or chief magistrate shall seem most convenient.

And if such person shall again offend in any of the premises, being lawfully convicted as aforesaid, and not making satisfaction and payment as aforesaid, such person shall be sent to the house of correction, and be there kept to hard labour for three months, and also publicly whipt as aforesaid.

And every such person offending a third time in the premises, and being thereof convicted, and not making payment and satisfaction as aforesaid, shall be deemed an incorrigible rogue, and shall be sent to the house of correction or workhouse, and there detained at hard labour for two years.

It shall be lawful for any constable or other person, by warrant of any justice of the peace or chief magistrate of any city, town, or place within the limits of their respective jurisdictions, to make search in all suspected houses and places for any wood, underwood, poles, trees, clap-boards, barrel-staves, pales, rails, stiles, posts, gates, or for any gadds, wyths, wattles, willows, hedge-wood, bark, rind, or coat of any tree unlawfully come by, or for any wool, thread, yarn, or other matter dyed or coloured with any bark, rind, or coat, of any tree unlawfully barked. *f.* 13.

And if such person shall find any of the premises in the possession of any person whom he shall suspect to have been guilty of the offences aforesaid, or any of them, he shall bring such suspected persons before any justice or chief magistrate, and such suspected person shall make proof before such justice or chief magistrate, to his satisfaction, that such trees, timber, timber-wares, wood, and underwood, and the bark with which such wool, thread,

thread, or yarn was respectively coloured, were fairly and honestly bought by such suspected person, or given to him; or in default thereof, such suspected person shall be judged, and shall stand convicted of the breach of this act, and shall be subject to the several penalties above inflicted for the first, second, and third offences before-mentioned.

If it shall appear upon oath to any justice of the peace or chief magistrate, that any persons have bought or received any such trees, timber, timberware, wood, underwood, hedgewood, bark, rind, or coat of trees, from any persons, whom the person so buying or receiving the same, had just cause to suspect to have stolen or unlawfully come by the same, it shall be lawful for such justice of the peace or chief magistrate to award the party who bought the same to pay the treble value thereof to the persons from whom the same were stolen or unlawfully taken, so as such treble value doth not exceed the sum of thirty shillings; and in default of payment, to levy the same by distress and sale of the goods of such person, by warrant under the hand of such justice of the peace or chief magistrate. *f. 14.*

And if such treble damages shall exceed thirty shillings, then such justice or chief magistrate shall bind over such person to the next quarter sessions; and the justices at such sessions shall have power to assess and ascertain such treble value, and to make such order for the levying thereof by distress and sale of such offenders goods, as to them shall seem meet.

And also by 9 *Ann. cap. 5.* Any person who shall cut or make use of any gadds or wyths, on their plows, carrs, carts, harness, tackle, or otherwise, or in whose possession any gadds or wyths shall be found, either felling or using the same, shall for every gadd or wyth so cut, used, or found, forfeit two-pence, to be immediately paid to the informer by the said offenders, after information given. *f. 5.*

And if the said offenders shall refuse immediately to pay the same, the next justice of the peace or other chief magistrate within any town or corporation, is required, by warrant, to cause the same to be levied of the goods of the offenders.

And if there is no justice of the peace or other chief magistrate near the place where such gadds or wyths are found or seized, it shall be lawful for the constable of the parish, and he is required, where the said information shall be made, to demand the payment of the penalties hereby imposed.

And if the persons with whom such gadds or wyths shall be found, shall neglect to make such payment, such persons, so offending, shall be carried before the next justice of the peace, who is required to levy double the sum hereby directed for such offence, by sale of the goods of the offender, as before directed.

And in case no such distress can be found of such offender, such justice shall, by warrant under his hand and seal, require the petty constable of the next parish, wherein there is a market town, to whip such offender through the market of such town, between the hours of ten and twelve in the day time, until the blood shall come.

No person shall be prosecuted for any offence before-mentioned, unless the offenders be prosecuted within one month after the offence committed; and this act shall be read at every assizes and sessions. *f. 6.*

And

And moreover by the 2 Geo. 1. cap. 16. It shall be lawful for any person to seize, to his own use, any gadds or wyths which they shall find in any fair market or place; and the persons in whose possession such gadds or wyths are found, shall be carried before some justice of the peace, living near the place where such seizure is made, which justice is required, by warrant, to command the petty constable of the next parish, wherein there is a market town, to whip such offender through the market of such town, between the hours of ten and twelve in the day, until the blood shall come. *f. 10.*

And by the 8 G. 1. c. 8. No person shall make use of any part of any saplin or tree for a bow, for a carr, or any saplin, gadd, or any piece of stick or wood for a back-band, for a carr, or scollops of oak or ash for thatching of houses; or shall make use of any oak saplin for walking sticks, handles of whips, or switches, under the penalty of forfeiting five shillings, to be recovered from and paid by such offender, being convicted of any of the said offences by any justice, or the chief magistrate of any city or town corporate, upon the oath of one credible witness; one moiety thereof to the informer, the other moiety to the use of the poor of the parish where such conviction shall be. *f. 3.*

And in default of payment of the said forfeiture, such offender shall be publicly whipt in some market town, by order of such justice or chief magistrate, by warrant for that purpose, to be made under their hands and seals respectively, and all magistrates of all cities, towns corporate, and market towns.

And all justices of the peace in their respective counties, are required to put this and all clauses in any former law, prohibiting the use of wyths and gadds, in execution.

And also by 21 Geo. 2. cap. 13. Whereas the young timber trees and saplins are greatly destroyed by making bows and back-bands thereof for carrs, and twisting the same into gadds: All carrs and carriages making use of any part of any saplin or tree, as for a bow or backband, or twisted into gadds for backbands, halters, traces to draw by, or long gadds, shall, for passing through any turnpike gate, pay one penny half-penny, over and above the toll required by any act now in force; and every horse carrying any pack tied with gadds, shall pay one penny, over and above the toll required by any act now in force, for passing through any turnpike gate. *f. 15.*

A. Warrant to search for stolen wood; on the 4 Ann. c. 9.

Dublin. { To the constable of——.

WHEREAS A. I. of——yeoman, hath this day made oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that divers quantities of wood, within the space of six weeks last past, have been cut, taken, and carried away off and from his lands at——in the said county [or as the case shall be]; and that he hath just cause to suspect, and doth suspect, that the said wood, or part thereof, is concealed in the houses, outhouses, yards, gardens, or other places belonging to such houses of
A. O.

A. O. of——yeoman, at——aforesaid; These are therefore to require you to enter into and search the said houses, outhouses, yards, gardens, or other places belonging to such houses of him the said A. O. at——aforesaid; and if on such search you shall there find any such wood, that then you apprehend the person in whose house, outhouse, or other place it shall be found, and bring him before me, or some other of his majesty's justices of the peace for the said county, that such proceedings may be had thereupon, as to law doth appertain. Given under my hand and seal at——in the said county, the——day of——in the——year——.

B. Order for satisfaction to the owner; on the 10 C. 1. ff. 2. c. 23.

——WHEREAS A. I. of——in the said county, yeoman, on the——day of——now last past, did make oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that on or since the——day of——now last past, a certain quantity of wood, the property of him the said A. I. at——in the parish of——in the county aforesaid, was cut and spoiled. and from thence taken and carried away; and that he had just cause to suspect, and did suspect, that A. O. of——in the said county, yeoman, did cut, spoil, take, and carry away the same; And whereas the said A. O. was on the——day of——now last past, apprehended by A. C. constable of——in the said county, carrying wood suspected to be stolen by him the said A. O. [Or, whereas a certain quantity of wood, suspected to be stolen, was this day, by virtue of my warrant for that purpose directed to the constable of——in the said county, found in the house (or other place) of the said A. O. at——aforesaid] And whereas the said A. O. being now brought before me, hath not given to me any satisfactory account how he came by the said wood, nor can produce the party of whom he bought the same, nor any credible witness to testify upon oath the sale thereof; therefore the said A. O. is convicted by me of cutting, spoiling, taking, and carrying away the said wood; And whereas also it is duly proved before me, that A. I. of——aforesaid, yeoman, was and is the owner of the said wood, and that the said offence was committed at——aforesaid, in the parish of——in the said county, I do therefore hereby order and appoint the said A. O. within the space of——days now next ensuing, to pay unto the said A. I. the sum of——in recompence and satisfaction for damages done unto him the said A. I. by him the said A. O. in cutting, spoiling, taking, and carrying away the said wood; and I do also hereby order the said A. O. within the space of——days now next ensuing as aforesaid, to pay to the overseers of the poor of the parish of——aforesaid, for the use of the poor of the said parish, the sum of 10s. for his said offence. Given under my hand and seal at——in the said county, the——day of——.

C. Com-

C. Commitment thereupon for non-payment.

Dublin. { To the constable of——and to the keeper of the house of correction at——in the said county.

WHEREAS A. I. of——in the said county, yeoman, on the——day of——now last past, did make oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that within the space of six days then last past, a certain quantity of wood, the property of him the said A. I. at——in the parish of——in the county aforesaid, was cut and spoiled, and from thence taken and carried away; and that he had just cause to suspect, and did suspect, that A. O. of——in the said county, yeoman, did cut, spoil, take, and carry away the same; And whereas the said A. O. was on the——day of——now last past, apprehended by A. C. constable of——in the said county, carrying wood suspected to be stolen by him the said A. O. [Or, whereas a certain quantity of wood, suspected to be stolen, was on the——day of——now last past, by virtue of my warrant for that purpose directed to the constable of——in the said county, found in the house (or other place) of the said A. O. at——aforesaid;] And whereas the said A. O. on the——day of——now last past, having been brought before me, did not and could not give to me any satisfactory account how he came by the said wood, nor could produce the party of whom he bought the same, nor any credible witness to testify upon oath the sale thereof, and thereupon was by me convicted of cutting and spoiling the said wood, and ordered to pay to the said A. I. the owner of the said wood, the sum of——within——days then next ensuing, in recompence and satisfaction for damages, and also the sum of 10s. to the overseers of the poor of the parish of——aforesaid, where the said offence was committed, for the use of the poor of the said parish; And whereas it appears to me, that the said several sums have been duly demanded of him the said A. O. but that he the said A. O. hath refused, and doth refuse to pay, and hath not yet paid the same, nor any part thereof: I do therefore hereby require you the said constable of——aforesaid, to convey the said A. O. to the said house of correction at——aforesaid, and to deliver him to the keeper thereof, together with this warrant: And I do hereby command you the said keeper to receive him into your custody in the said house of correction, and there to detain him for the space of——days. Herein fail you not. Given under my hand and seal, at——in the said county, the——day of——in the——year——.

D. If instead of being sent to the house of correction, he is ordered to be whipt, then say,——I do therefore hereby command you the said constable forthwith to receive the said A. O. into your custody, and to strip him naked from the middle upwards, and whip him until his body be bloody.

5 H **E.** Order

E. Order for the buyer of stolen wood, to pay treble damages;
on the 4 Ann. c. 9.

— **W**HEREAS it hath been duly proved before me—esquire,
one of his majesty's justices of the peace for the said county,
that A. O. of—yeoman, did within the space of six weeks now last past,
buy several burdens of wood of B. O. of—yeoman, and that be the said
B. O. is justly suspected to have stolen the same from A. I. of—yeoman,
and that the said wood, at the time when the said A. O. so bought the same,
was of the value of 10s. I do therefore hereby order, that the said A. O.
do forthwith pay unto the said A. I. the sum of 30s. the same being treble va-
lue of the said wood so by him bought as aforesaid. Given under my hand and
seal at—in the said county, the—day of—in the—year of the
reign of—.

F. Warrant of distress for non-payment of the same.

— Here recite the order.—Then say, And whereas the said
A. O. hath not paid to the said A. I. the aforesaid sum of 30s. nor
any part thereof; These are therefore to command you to make distress of the goods
and chattels of him the said A. O. and if within the space of [five] days next
after such distress by you made, the said sum of— together with reasonable
charges of taking and keeping the said distress, shall not be paid, that then
you do sell the said goods and chattels so by you distrained, and out of the money
arising by such sale, pay the said sum of— unto him the said A. I. return-
ing the overplus upon demand, unto him the said A. O. the reasonable charges
of taking, keeping, and selling the said distress being thereout first deducted.
Given, &c.

G. Commitment for destroying trees; on the 10 W. c. 12.

— { To the constable of—and to the keeper of the house of cor-
rection at—in the said county.

FORASMUCH as A. O. of—in the county aforesaid, yeoman,
is this day duly convicted before us—esquires, two of his majesty's
justices of the peace for the said county, for that be the said A. O. on the—
day of—now last past, at—aforesaid, in the county aforesaid, did
wrongfully and maliciously cut down two ash trees [or as the case shall be], the
property of A. I. of—yeoman, without the consent of him the said A. I.
the owner thereof, or of any other person chiefly intrusted with the care and
custody thereof; We do therefore hereby command you the said constable, to con-
vey the said A. O. to the said house of correction at—aforesaid, in the
county aforesaid, and to deliver him to the keeper thereof, together with this
precept. And we do also hereby require you the said keeper of the said house
of correction, to receive him the said A. O. into your custody in the said house of
correction.

I. Con-

I. Concerning clothiers and their workmen.

II. Pulling wool.

III. Concerning the winding of wool by the seller.

IV. Concerning the fulling of cloth.

V. Concerning the searching of cloth, and therein of the length, breadth, and weight thereof.

VI. Concerning the dying of cloth.

VII. Concerning tenters, and the stretching of cloth.

VIII. Concerning the dressing of cloth.

IX. Spinning woollen yarn.

X. Laws to prevent the exportation of wool and woollen cloth from Ireland.

I. Concerning clothiers and their workmen.

BY the act 4 Ed. 4. c. 1. Cloth makers shall pay to the carders, spinners, and all other labourers, money for their wages, and deliver woolls to be wrought according to the due weight, upon pain of forfeiture to the labourer the treble of his wages not paid; and also to forfeit to the labourer for every delivery of excessive weight to be wrought 6d. for every default. *f. 5.*

Every carder, spinner, weaver, fuller, sheerman and dyer, shall duly do his labour, upon pain to yield to the party grieved double damages. And every fuller in fulling, rowing, or tafeling of cloth shall exercise tafels and no cards, upon pain to yield to the party grieved double damages. *f. 6.*

And every justice of peace out of cities and towns, where any mayor, master, warden, or bailiffs be, and every mayor where there is no master, and every master where there is no mayor, and every bailiff where there is no mayor nor master, and every port-reeve where no mayor, master, or bailiff is, and every constable of hundred, and every steward keeping wapentake or leet out of city or borough, shall have power to hear and determine the complaints of every such cloth maker and labourer, by examination of parties, and to commit the offenders to the next gaol within the county, till the duties, forfeitures, and damages be paid.

And the said justices of peace, mayor, master, warden, bailiff, port-reeve, and steward, upon information of any other person which is not grieved, shall have power within his jurisdiction to cause the party to come before him, and to examine them.

And if the party by examination or due proof be found guilty, he shall forfeit to the king, or to such persons which be intitled to have fines or amercements, 3s. 4d.

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And the justices of peace, and other officers, shall have power to make like process against the party, to cause him to appear to be examined as justices of peace have upon information made for surety of peace without any fee to be taken.

II. Pulling wool.

By the act 10 & 11 Car. 1. cap. 15. No person shall pull the wool of any living sheep, instead of shearing or clipping of them; and the justices of assize at the general assizes, and the justices of peace at their quarter-sessions, shall have power to inquire of and determine offences contrary to this act, and to punish offenders by fine and imprisonment, as they shall think fit.

III. Concerning the winding of wool by the seller.

1. No man shall make any inwinding within the fleece, at the rolling up of his wool; nor put in the same, locks, pelt wool, tar, stones, sand, earth, grass, nor any dirt; and if he do, the party grieved may bring his action at common law of trespass and deceit. 8 H. 6. c. 22.

IV. Concerning the fulling of cloth.

Every fuller, in his craft and occupation of fulling, rowing, or tayfeling of cloth, shall use tayfels, and no cards, deceitfully impairing the said cloth, on pain to yield to the party grieved his double damage: And every justice of the peace, mayor, master, warden, bailiff, portreeve, constable of hundred, and steward of leet in their respective liberties, may hear and determine the same, and commit the offender to the next gaol till payment. And also any person not grieved may make information to any such justice, mayor, master, warden, bailiff, portreeve, or steward; in which case the offender shall forfeit to the king, or to such person as shall be intitled to fines or amercements within their jurisdiction, 3s. 4d. and they may make process against the party in like manner as justices of the peace may do for sureties of the peace, without any fee to be taken for the execution of their offices in this behalf. 4 Ed. 4. c. 1. f. 6.

And no cloth, not fullled, shall be exported; on pain of forfeiting the same, half to the king, and half to him that will sue. 7 Ed. 4. c. 3.

V. Concerning the searching of cloth, and therein of the length, breadth, and weight thereof.

By the act 17 & 18 Car. 2. Cap. 15. There shall be an office called the alnage-office, and the chief officer therein shall be called his majesty's alnager, and shall be constituted by letters patent under the great seal for years

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years or for life, and shall execute the said office by himself or sufficient deputies; and shall by himself or his deputies measure, view, try, weigh and search all broad cloths, &c. and all other cloths and commodities to be made of wooll, part of wooll, cotton-wooll, or otherwise, commonly called the old and new drapery, before they be offered to sale, shipped or embarked, whether the same be of the length, breadth and weight limited, and be made, wrought, and dressed without straining by any instrument or device.

All saleable cloths, half-cloths, and pieces of cloths, kerseys, freeze, cottons, ruggs, and all other cloths called the old drapery; and also all saleable bays, serges, fustians, stuffs, and other commodities made of wooll, part of wooll, cotton or otherwise, known by the name of the new drapery, offered to sale, shipped or embarked, shall be made of the length, breadth, and weight herein after mentioned: that is to say, all broad cloths mixed and dyed in wooll, to be in length betwixt twenty three and twenty five yards out of the mill, and no more, and in breadth six quarters and one half of a quarter out of the mill at the least within the lifts, and in weight, being well thicked, scoured, fulled, dressed, and dried, three-score and twelve pounds, and to be all made with narrow lifts.

And also all broad cloths woven white to be of the same breadth and length, and in weight threescore pounds.

And kerseys of all sorts not to exceed eighteen yards in length, and to be full three quarters and one half quarter of the yard out of the mill in breadth, and in weight being dyed in the wooll, twenty four pounds, and white kerseys, every yard to weigh a pound.

All cottons and bandle cloth to be in length twenty four yards of the piece, and in breadth, being fully thicked, scoured, and dressed one full yard.

Also all manner of baize not to exceed forty four yards in length, nor to be less out of the mill than a full yard in breadth; all broad baize, called hundreds or blue lifts, not to exceed threescore yards in length, and to be in breadth seven quarters.

All says and serges to be in length twenty four yards, and not less than a full yard in breadth.

All carpettings, hangings, and dornocks, not to exceed twenty four yards in length, and carpettings and hangings to be in breadth either six quarters or three yards, and dornocks five quarters broad.

And other stuffs to be made of wooll, part of wooll, cotton-wooll, commonly called the old and new drapery, not to exceed twenty four yards in length, and not to be less than a full yard in breadth within the lift.

And all manner of caddows and ruggs to be a yard in breadth within the lift or selvaige out of the loom.

And the said alnager or deputies shall upon measuring, viewing, trying, searching, and weighing of the said cloths, &c. and other commodities so to be made, and to be put to sale, shipped or embarked, in case the same be found to be good and merchantable ware, seal or mark the same with a seal or mark to be allowed of by the lord treasurer of *Ireland*, or chancellor of his majesty's exchequer here.

And

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And in case any of them be found not to be merchantable, but defective and deceitfully wrought, to cut or jagg the same at both ends, thereby to note the same defect without any seal or other mark to be put to the same, to the intent that no persons be deceived thereby.

And the alnager and his deputies shall receive to his majesty's use for the subsidy and alnage of all the said cloths and other stuffs and commodities aforesaid, as well sealed as jagged, and for all knit-stockings, fringes, cruels, lace, boulding, swadling bands or bridling to be made of wooll, cotton-wooll, or otherwise, and to be put to sale; such sums as are hereafter mentioned, that is to say :

For every broad cloth four pence for the subsidy thereof, and for the alnager's fee for the sealing of the same, one halfpenny ; and for every half cloth two pence for the subsidy thereof, and for the alnager's fee one farthing, and so rateably for every kind of cloth and other draperies and commodities aforesaid, called the old drapery, according to the several lengths of the same.

And for every piece of say, serge, stuff, knit-stockings, and of all other of the commodities aforesaid, called the new drapery, for every four pound weight thereof for the subsidy of the same one farthing, and so rateably for every lesser proportion of the same ; and for the alnager's fee for the sealing and jaggings thereof one farthing, and so rateably.

And for the measuring, searching, viewing, trying, and weighing of every broad cloth, kersey, ruggs, baize, cotton, and other drapery, containing in length twenty three yards, or between twenty three yards and twenty five yards, shall be paid to the alnager for the searching thereof for his fee two pence, and so rateably for every piece of like cloth, kerseys, ruggs, and of all other the like draperies and commodities aforesaid, according to the number of yards and quantities that they shall contain.

And whatsoever clothier or worker of any the commodities aforesaid, or any other persons that shall offer to sale, ship or imbark any such saleable cloths, &c. or commodities whatsoever made of wooll, part of wooll, cotton-wooll, or otherwise, called the old or new drapery made within this kingdom, before they shall be first measured, searched, and weighed by the alnager, &c. and shall be by some of them approved and marked as by this act is appointed to be merchantable, and that they have paid the subsidy and alnager's fee for the same ; every such clothier and maker of any such cloths, or of any other the commodities aforesaid, or such other persons offering to sale, shipping or imbarking, shall forfeit all such goods so offered to sale, shipped or imbarked, to his majesty, to be recovered as in this act is directed.

If the alnager, his deputies or substitutes, shall not duly execute the said office in the due measuring, weighing, viewing, searching, trying, sealing, and marking of any of the aforesaid saleable cloths, &c. or commodities aforesaid, called the old and new drapery ; or if the said alnager or deputies shall be negligent or otherwise shall offend in the due execution of the said office, the said alnager and deputies so offending, shall forfeit to his majesty for the first offence, being convicted thereof, ten pounds, and after such fine paid being convict of a second offence, twenty pounds, and after such second fine and punishment imposed, being convict of a third offence thirty

ty pounds, and so for each offence of that kind which they being found guilty shall be fined for severally and respectively in manner as aforesaid.

And the conviction of the said alnager and recovery of the said forfeiture shall be by indictment, presentment, or information to be brought in any of his majesty's courts in *Dublin*, or before justices of assize, or the justices of the peace at their quarter-sessions where such offence shall be committed, wherein no essoign shall be admitted.

Every clothier and maker of cloth and stuffs, or any other commodities made of wooll, part of wooll, cotton-wooll, or otherwise, commonly called the old or new drapery for sale, before they shall offer to sale, ship or imbarke the same, or any part thereof, they shall weave their marks into the head-end of all such cloths, &c. and every other of the cloths and commodities, called the old and new drapery, upon pain of forfeiture of all such cloths and other commodities as shall not be so marked.

Provided, that neither the alnager, nor his deputies, shall either search, view, try, weigh or seal any of the cloths, stuffs or commodities aforesaid, made by any persons for their own uses, or for the use of their families, neither shall take or require any thing for the same, upon pain of forfeiture of five pounds to his majesty, being convicted of the said offences in such manner as by this act is declared.

There shall be convenient places appointed by the alnager, or by his deputies in every city, market-town, and other convenient place, for the measuring, searching, viewing, weighing, marking, and sealing of all such cloths, &c. and commodities aforesaid, called old and new drapery, whereby every person that shall have any of the commodities aforesaid to be searched, viewed, measured, tryed, and sealed, may know where to have the same done, and may not be drawn to travel above the space of six miles from their several abodes for the perfection thereof.

And also the alnager shall have power to appoint in every of the counties, cities, villages, and places within this kingdom such deputies, as well for the measuring, searching, viewing, weighing, marking and sealing of all such cloths and commodities aforesaid, as are hereby to be measured or sealed; and also for the collecting of the said subsidy and alnage to his majesty's use, as to the said alnager shall be thought convenient, and likewise to perform whatsoever shall be necessary or lawful to be done therein by the said alnager.

And it shall be lawful for the said alnager, his deputies, and every of them, to search in all ships and boats, fairs and markets of *Ireland*, as often as occasion shall require, and in the day time with the constable or other officer of the parish, to enter into and search all the houses, ware-houses, shops, or cellars of any persons, as well within liberties as without, where any such cloths, or any other of the said commodities shall be supposed to be, and the same to make stay of until the owners thereof have answered their contempt therein.

And if any persons shall resist or deny searches by the said alnager, or his deputies, to be made as aforesaid, they shall for every such offence, being convict thereof in manner as aforesaid, incur such penalty as the justices before whom the persons so convict shall think fit to impose, not exceeding ten pounds.

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No searcher or waiter of any port, shall knowingly permit any of the aforesaid cloths, &c. or commodities to *be carried* into any ship or boat, unless the same be marked and sealed by the alnager, or his deputies, or one of them, with the seal or mark thereunto ordained, upon pain of forfeiture of his office and imprisonment by the space of six months, being duly convicted thereof in manner as aforesaid.

All his majesty's officers and subjects shall be aiding and assisting unto the alnager and to his deputies, by all lawful means for the due execution of the aforesaid offices.

If any persons do counterfeit, and set to, or take away from any the cloths and other commodities herein called the old and *new* drapery, the alnager's seal appointed to be fixed to such commodities by this act, every person so offending, and being duly convicted thereof in such manner as is herein appointed, shall forfeit for every such offence, as often as he shall be convicted thereof in manner as aforesaid, the sum of ten pounds *sterling* for every such offence, to be recovered to his majesty's use in manner as aforesaid.

VI. Concerning the dying of cloth.

By the act 1 R. 3. c. 8. No person shall dye woollen cloth with orchel or cork called jarrock, upon pain to forfeit 40 s. for every cloth. Nor no person shall put to sale any such cloth dyed with orchel or cork, called jarrock, upon pain of forfeiture of such cloth. These pains to run upon the seller, except that cork made within *England* may be used in dying upon woollwards, and in dying of cloth made only of woollwards, so that the same wooll and cloth be perfectly boiled and maddered. *f. 15.*

Cork made in this realm may be put upon cloth that is perfectly boiled and maddered. Also no dyer shall dye any cloth, except he dye the cloth and the list with one colour, without tacking any bulrushes or such like thing upon the list, upon pain to forfeit 40 s. for every cloth. And no person shall put to sale any cloth deceitfully dyed, upon pain to forfeit the cloth or the value; the same forfeiture always to run upon the seller. *f. 16.*

If any happen to seize woollen cloth, otherwise made or dyed than aforesaid, he shall bring the same before the mayor, bailiffs, or other governor of the cities, towns, or villages where such seizing shall be made, to judge by the discretion of the mayor, &c. calling to him such persons as shall seem convenient, whether the cloth be otherwise made, wrought or dyed than according with the acts. And if it be judged that the cloth is made or dyed contrary to the acts, the cloths shall be cut in three pieces in presence of the mayor, &c. one part to be delivered in the exchequer by him that shall seize the same, the second part to be delivered to the seizer, and the third part to be delivered to the said mayor, &c. to the use of the commonalty; the one half of all the other penalties to be to the king, and the other half to the king's subjects that shall seize or sue for the same. *f. 17.*

VII. Con-

VII. Concerning tenters, and the stretching of cloth.

By the act 1 R. 3. c. 8. No person shall set nor draw in length or breadth any woollen cloth after it be fully watered by tentering or otherwise, upon pain to forfeit the cloth. *f. 7.*

No person shall keep any tenter, or any other thing in his house whereby woollen cloths may be drawn out in length or breadth, upon pain to forfeit 20*l.* but all tenters used for due stretching of cloth after it cometh from the mill, and before it be rowed, shall be set in open places. *f. 13.*

And all mayors, bailiffs and governors of cities, towns, and villages, shall diligently survey, that all cloths put upon tenters shall not be drawn out in length and breadth, otherwise than before rehearsed.

VIII. Concerning the dressing of cloth.

1. No woollen cloth shall be exported, till it be barbed, rowed, and shorn; on pain of forfeiting the same, half to the king, and half to him that will sue. 3 H. 7. c. 11.

And by the 1 Ric. 3. cap. 8. sect. 1. No person shall put to sale any broad cloths, unless the same be fully watered.

Every whole cloth and broad cloth after it be fully watered, shall contain in length 24 yards, and to every yard an inch, to be measured by the crest of the cloth, and shall contain in breadth two yards within the lifts. *f. 2.*

Every half cloth after his full watering, shall contain 12 yards in length with the inches, and 2 yards in breadth within the lifts; so that the half cloth do not exceed 16 yards, upon pain of cutting the whole cloth in three pieces, and the half cloth in two pieces; and also to lose for every whole cloth 6*s.* 8*d.* and for every half cloth 3*s.* 4*d.* and if the whole cloth be longer than 24 yards and the inches, and the half cloth longer than 12 yards with the inches, the buyer shall pay for as much as it doth exceed, so that the half cloth do not pass 16 yards. *f. 3.*

Every kersey after the full watering shall contain in length 18 yards and the inches, and in breadth one yard and a nail within the lifts, upon pain of cutting the kersey in two, and to lose 3*s.* 4*d.* the said forfeitures to run upon the fellers; and every the said cloths shall be duly made through-out. *f. 5.*

No man shall set, cast, or put upon any cloth any flour, or other like deceitful thing, upon pain of 40*s.* for every cloth. *f. 8.*

No person shall set or cast upon any white cloth or kersey, any chalk upon like pain. *f. 9.*

Also no sheerman or other, shall sheer nor cancel any cloths, except such cloth be before fully watered, upon pain to forfeit 40*s.* for every cloth. *f. 10.*

No person shall retail any woollen cloth lining nor other, except it be fully watered; and after it be watered it shall in no wise be set nor drawn

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in length or breadth, upon pain to forfeit the cloth or the value. The same pain to run upon the seller of such cloths. *f. 12.*

And by the 17 C. 2. c. 15. Every person pressing of any sort of woollen cloths with any hot press, or other like deceitful means, shall forfeit all cloths so pressed. *f. 6.*

IX. Spinning woollen-yarn.

By the act 7 G. 2. c. 9. The snap-reel whereon bay-yarn shall be reeled, shall contain one yard and three quarters and one inch in circumference, and each skain of bay yarn shall be three quarters and half a quarter of a yard in length, and no more, and each skain shall contain six lays or cuts, and each lay or cut eight score threads, and no more, under the following penalties, that is to say. *f. 1.*

Every reelmaker who shall make, and every spinner who shall use any snap-reel for reeling of bay yarn of less than a yard and three quarters, and an inch in circumference, shall forfeit five shillings for every such offence.

And every spinner who shall make up skains of bay yarn, of less than three quarters and half a quarter of a yard in length, or less than six lays or cuts to each skain, and eight score threads to each lay or cut, shall forfeit two pence for every skain so made up, and every comber and yarnmaker, who shall knowingly sell or expose to sale any yarn made contrary to the directions of this act, shall forfeit a sum not exceeding three shillings for every hundred skains of such fraudulent yarn, and so in proportion for a greater or lesser quantity.

Provided that if no more than six threads are wanting in a lay or cut; and it shall appear that such deficiency was occasioned by mistake, and not by a wilful neglect, in such case, no penalty shall be incurred on account thereof. *f. 2.*

Whereas spinners and other persons to whom combers or yarnmakers set out their wool to be spun, do often imbezzel, sell or detain for an unreasonable time, such wool, it shall be lawful for one justice of the peace, or the chief magistrate of the place where such offence shall be committed and complained of to determine the matter of such complaint, and to award such satisfaction to the party aggrieved by the persons complained of, as such justice or chief magistrate shall think reasonable, provided such wool so delivered doth not exceed the value of twenty shillings, and provided such satisfaction shall not exceed ten shillings over and above the value of such wool.

Whereas several combers and other persons do inveigle spinners by bribes and other means to change the yarn and wool of other combers left with such spinners to be spun, for other wool and yarn left in lieu thereof, every such person who shall inveigle and get from any spinner, the yarn or wool of any other person, in exchange for wool or yarn left with such spinner in lieu thereof, being thereof convicted, shall forfeit forty shillings for every such offence. *f. 3.*

All the penalties by this act inflicted on the reel-makers, spinners, and other manufacturers of bay yarn, or to be recovered by virtue of this act, shall be to the use of them who shall inform or prosecute for the same with effect, and shall be levied in the manner following, that is to say, upon information upon oath, or solemn affirmation, if the complainant be a *quaker*, to any justice of the peace, or chief magistrate of any corporation, against any persons who shall have acted contrary to this act, the said justice or chief magistrate shall issue a summons in writing, under his hand and seal, thereby requiring the persons so informed against, at a certain day and place within the limits of the county or corporation wherein the said offence shall be committed, to appear before such justice or chief magistrate to answer the said complaint. *f. 4.*

At which time and place the said justice or chief magistrate, shall, in the presence of the persons so accused, or in case of their neglect to appear, being duly summoned, proceed to the examination of the said matter; and if it shall appear on evidence upon oath or solemn affirmation as aforesaid, of one credible witness, that the said persons are guilty of the offences herein mentioned, or of any of them, the said justice or chief magistrate shall, by warrant levy the said respective forfeitures by distress or sale of the offenders goods, and dispose of the said forfeitures to the informers.

And for default of such distress to be had, every such offender, being above the age of sixteen years, shall, by warrant of such justice or chief magistrate be publickly set in the stocks in the next market town, on the next market day, in the time of high market, for any time not less than four hours, and not exceeding eight hours, or be committed to the house of correction, there to be whipt and kept to hard labour for any time not under eight days, nor exceeding thirteen days, provided that no person shall be prosecuted for the said frauds or abuses, unless the same be proved or prosecuted within thirty days after discovery.

And by the 31 G. 2. c. 10. An act passed in the seventh year of his present majesty's reign, intituled, *An act to prevent frauds and abuses in bay yarn exported to Great Britain*; and all the clauses and provisos therein and herein after contained, are continued and made perpetual. *f. 11.*

If any reel-maker shall make, or any spinner shall use any snap-reel for reeling bay yarn or cotton yarn, of less than a yard and three quarters and inch in the circumference, or if any spinners shall make up skains of bay yarn or cotton yarn of less than three quarters and half a quarter of a yard in length, or less than six lays or cutts to each skain, and eight score threads to each lay or cutt, and shall be thereof convicted by the oath, or (being of the people called *Quakers*) solemn affirmation of the owner of such goods, or by the oath or affirmation of any other credible witness, or by the confession of the persons charged with such offence, before any justice of the peace of the county where such offence shall be committed, or where the persons so charged reside (which oath or affirmation the said justices shall be required to administer) it shall be lawful for the said justices, by warrant under their hand and seal, to commit the persons so convicted to the house of correction, or other publick prison of such place, there to be kept to hard labour for any time not exceeding ten days, and also to order the persons so convicted,

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convicted, to be once publick whipped at the market place, or some other publick place of the place where such offender shall be committed. *f. 12.*

And in case of a further conviction in manner before prescribed for a subsequent offence of the same kind, it shall be lawful for the justices, before whom such conviction shall be had, to commit the persons so again offending, to the house of correction, or other publick prison as aforesaid, there to be kept to hard labour for any time not exceeding two months, nor less than one month.

And also to order the persons so again offending, to be publicly whipped at the market-place, or some other publick place where such offenders shall be respectively committed, twice, or oftner, as to such justices shall seem reasonable; any thing in the said act 7 *Geo. 2. cap. 9.* to the contrary notwithstanding.

X. *Laws to prevent the exportation of wool and woollen cloth from Ireland.*

1. To avoid frequent repetitions under this head, it may be proper to premise (once for all) these things following:

(1) Notwithstanding the limitation of actions by the prosecutor in the following sections, to one year after the offence committed: yet by a general clause 9 & 10 *W. c. 40.* The king may cause persons guilty of exporting wool, wool fells, fuller's earth, or scouring clay, to be prosecuted at any time in three years. *f. 9.*

(2) That all actions, suits, and informations upon any act for preventing exportation of wool, wool fells, wool flocks, mortlings, shortlings, worsted, bay or woollen yarn, cruels, or wool slightly manufactured, or matrasles, or beds stuffed with combed wool, or wool fit for combing, fuller's earth, fulling clay, tobacco pipe clay, or any other scouring earth or clay, from *Great Britain or Ireland.*

Or for preventing the exportation from *Ireland* into foreign parts, of cloth, serges, baize, kerseys, frizes, druggets, shalloons, stuffs, cloth serges, or any other drapery made of or mixed with wool, manufactured in *Ireland*,——may be entered and prosecuted (except as is herein after otherwise expressed) in any court of record at *Westminster*, or in the court of exchequer in *Scotland*, or at the quarter sessions of the peace, or before any two justices out of sessions in a summary way, or in *Ireland* by any law relating to the revenue.

And if the property be claimed by any person, the proof shall lie upon him, and not on the officer or seizer. 12 *G. 2. c. 21. f. 18.*

Which clause hath enlarged this article very much; by bringing in all those statutes, with which the justices before had nothing to do.

(3) And if the prosecution is in any court of record at *Westminster*, for any of these offences, in or before the statute of the 10 & 11 *W. c. 10.* a *capias* shall issue after the first process, specifying the sum of the penalty sued for; and such person shall give good bail to the officer serving the process, to appear to answer to the prosecution; and at the time of appearance

ance shall give bail in court, to pay the penalties if convicted, or yield his body to prison. *f. 20.*

And if any person shall be in prison for want of bail, for exportation of wool or wool fells (or for aiding or abetting the same, 12 G. 2. c. 21. *f. 27.*) and shall refuse to appear or plead to a declaration or information to be delivered to him or to the goaler, by the space of one term, judgment shall be entered against him by default; and if judgment be so obtained against him by default, (or by verdict or otherwise), and he pay not in three months the sum recovered, the court shall order him to be transported for seven years. 4 G. c. 11. *f. 6.*

(4) And to prevent collusive seizures, or fraudulent agreements to evade the penalties, none but officers of the customs, excise, or salt, except the officers of the guard ships hereafter mentioned, shall enter informations of seizures of wooll or woollen goods; which shall be prosecuted in their, or in the attorney general's name, and not otherwise. 12 G. 2. c. 21. *f. 14, 15.*

And if such officer make any such collusive seizure, or fraudulent agreement, he shall forfeit 200*l.* and be disqualified for any office in the revenue; and the owner making such agreement with him, shall forfeit treble value; to him who shall sue in the courts at *Westminster, Dublin, or Edinburgh.* *id. f. 16.*

But if any person concerned in such fraudulent seizure or agreement, shall first (in three months) discover his offence to the commissioners of the customs, so that one accomplice be convicted; he shall be discharged of the penalties, and shall have the whole money recovered on the conviction (the charges first deducted). *f. 17.*

And if any person shall oppose or hinder any the said officers, or their assistants, in seizing any the goods before mentioned; or if any person armed, or disguised, shall attempt to rescue any the said goods seized; he shall be transported for seven years. *f. 26.*

And moreover, if any person offer a bribe to any officer for connivance; he shall forfeit 300*l.* to him who shall sue in any court of record at *Westminster.* *f. 25.*

(5) On condemnation of any wool, or other goods above mentioned, the commissioners of the customs respectively shall cause them to be publicly sold to the best bidder, where they shall think proper; and out of the produce of such sale, shall cause the charges of condemnation and sale to be paid, and the remainder to such person who shall seize, inform, or sue. 12 G. 2. c. 21. *f. 20.*

But if the officers shall receive information from any person, whereby any seizure is made, or any prosecution effected; such informer shall have half of what shall be recovered. *f. 21.*

And if any person convicted in the penalty of 3*s.* a pound (hereafter mentioned) be not able to pay; the commissioners may cause 1*s.* a pound to be paid to the informer or prosecutor, by the receiver of the revenue. *f. 22.*

And for the prosecutor's further encouragement, by the 19 G. 2. c. 34. hereafter following, If on an information for seizure of wool (during the continuance of the said act) a verdict is found for the claimer; yet if the judge

judge shall certify upon the record, that there was probable cause of seizure, the claimer shall have no costs. *f. 16.*

Exporting of
wool, felony.

2. By the 13 & 14 C. 2. c. 18. The exportation of wool was made felony; but this was repealed by the 7 & 8 W. c. 28. and the preamble to the repealing clause sets forth, that by the severity of the penalty, the prosecution of offenders had not been so effectually put in execution. But it doth not appear, why a reward for the informer or prosecutor was not thought of at that time.

Pecuniary and
other penalties
and forfeitures.

3. By the 12 C. 2. c. 32. No person shall export, nor pack or load upon any horse, cart, or carriage, nor lay on board, with intent to export any wool, wool fells, mortlings, shortlings, or any yarn made of wool, or any wool flocks, or any fuller's earth, or fulling clay; on pain of forfeiting the same, and that every offender shall forfeit moreover 3*s.* for every pound weight whereof. *f. 1, 3.*

(By the 7 & 8 W. c. 28. which, by the way, is a confused and ill penned act, another penalty is appointed, to wit, the forfeiture of such goods, and treble value, with treble costs; so that it seemeth, the offender may be prosecuted either for the wool and 3*s.* a pound, or for treble value with treble costs.)

And the owner of the ship, knowing the offence, shall forfeit all his interest in the ship and furniture. 12 C. 2. c. 32. *f. 3.* 7 & 8 W. c. 28. *f. 8.*

And the master and mariners, knowing the offence, and assisting thereunto, shall forfeit all their goods and chattels, and be imprisoned three months. 12 C. 2. c. 32. *f. 3.*

And by the 6 G. c. 21. If the master, purser, or other person taking charge of the ship, shall suffer any of the said goods, or any tobacco pipe clay, to be taken in from shore, to be carried beyond sea, he shall, besides any former penalties, be imprisoned six months. *f. 32.*

But if any master, mate, or mariner, shall in six months give an account to the commissioners of the customs, of such ship, and goods, and offenders, so as any may be convicted; he shall be indemnified, and shall have more-over three fourths of the penalties recovered, clear of charges, and the king shall have the other fourth, charges deducted. 12 G. 2. c. 21. *f. 23.*

And any merchant, or other person, offending herein, shall be disabled to require any debt or account belonging to him from any factor or other. 12 C. 2. c. 32. *f. 4.*

And the said offences may be tried either in the county where the goods were packed, laden, or laid aboard, or where the offender is apprehended. 12 C. 2. c. 32. *f. 5.*

And the ship, if an alien, or person not inhabiting in *England*, be the owner or part owner thereof, shall be forfeited to the king. 12 C. 2. c. 32. *f. 9.*

And all persons aiding or assisting therein, being convicted in one year, shall suffer three months imprisonment, 7 & 8 W. c. 28. *f. 10, 11.* Provided, that the first three persons, who have been aiding or assisting (not being owners or part owners thereof) who shall inform any justice of the peace of such offence, whereby the penalties may be recovered, shall not suffer such penalty. *f. 11.*

And

And moreover, all such exportation shall be deemed a publick nuisance.

13 & 14 C. 2. c. 18. f. 11.

4. And no coverlids, waddings, or other manufactures, slightly wrought, so as they may be reduced to wool again; or mattraffes or beds stuffed with combed wool, or wool fit for combing, shall be exported from *Great Britain* or *Ireland*; on the like pain as for exporting wool. 12 G. 2.

Exporting wool slightly wrought.

c. 21. f. 9.

5. And whereas fuller's earth, or fulling clay, is exported under colour of tobacco pipe clay, therefore no tobacco pipe clay shall be exported, on pain of 3 s. a pound. 13 & 14 C. 2. c. 18. f. 8.

Exporting fuller's earth in the name of tobacco pipe clay.

6. Nor shall any fuller's earth, or scouring clay, be exported into *Ireland*; on pain of 1 s. a pound. 9 & 10 W. c. 40. f. 2.

Exporting fuller's earth to *Ireland*.

8. And no wool, wool fells, mortlings, shortlings, wool flocks, worsted, bay or woollen yarn, shall be packed up in any box, barrel, cask, case, chest, or any other package; but only in packs of leather or packcloth; on which shall be marked on the outside the words WOOL or YARN, in large letters not less than three inches long; on pain of forfeiting the same, and the package, and 3 s. for every pound weight, to be paid by the owner or packer. 12 G. 2. c. 21. f. 10.

Packing of wool.

9. And no wool, wool fells, mortlings, shortlings, woollen yarn, wool flocks, fuller's earth, fulling clay, or tobacco pipe clay, shall be carried by land, but in the day time only, namely, from *Mar. 1.* to *Sept. 29.* between four in the morning, and eight at night; and from *Sept. 29.* to *Mar. 1.* between seven in the morning, and five at night, on pain of forfeiting the same or the value. 13 & 14 C. 2. c. 18. f. 9.

To be carried only by day.

And no wool, wool fells, mortlings, shortlings, wool flocks, worsted, bay or woollen yarn, worsted yarn, cruels, or wool slightly manufactured, shall be put on board any vessel, to be carried coastwise, or from one port to another in *Great Britain* or *Ireland*, without notice given to the officers of port, and bond given for the landing thereof, and a licence taken from such officers for so doing; on pain of forfeiting the same, with the vessel and furniture; and the bond to be sued, if a certificate of landing the goods is not brought in six months. 12 G. 2. c. 21. f. 11.

And to prevent collusive landing, none of the said goods, carried coastwise, shall be landed but in presence of the officers, and at the proper quays; on pain of forfeiting the same, or the value, and 3 s. for every pound, to be paid by the owner. *id.* f. 13.

And all cocquets, for carrying wool from any port, shall be written on paper, and not parchment (to prevent the erasing), and signed by three officers of the port; and all certificates of landing the same again in any other port, shall be signed in like manner: And all such wool, both at shipping and landing, shall be weighed in the presence of the said officers.

13. By the 26 G. 2. c. 11. It shall be lawful for any person, to export from any port in *Ireland*, any wool, or woollen or bay yarn, wool fells, shortlings, mortlings, wool flocks, and worsted yarn, to any port in *Great Britain*.

Exporting wool out of *Ireland*.

But no person shall export, or load, or ship, with intent to export, any wool, wool fells, shortlings, mortlings, or any woollen cloth, or manufacture,

Woollen Manufacture.

ture, out of *Ireland*, except it be into *Great Britain*; on pain of forfeiting the same, and the ship, and also 500*l.* and the master, mariners, and others assisting, 40*l.* 10 & 11 *W. c.* 10. *f.* 1, 2.

But the first three persons, not being owners, or part owners, who have been aiding in exporting the same, that shall inform any justice of the peace, whereby the penalties may be recovered; shall be freed from all penalties for the same. 3 *G. c.* 21. *f.* 5.

And bond or double value of the goods shall be given to the officers of the customs, for every ship exporting the same, that they shall be landed in *Great Britain*. 10 & 11 *W. c.* 20. *f.* 5.

And no wool, or any of the said goods, shall be brought into *Great Britain* from *Ireland*, but in ships of the built of *Great Britain* or *Ireland*; on pain of forfeiting the goods, or the value, together with the ship and furniture. 12 *G. 2. c.* 21. *f.* 6.

And to prevent collusive landing, none of the said goods imported from *Ireland*, shall be landed but in presence of the officers, and at the proper quays; on pain of forfeiting the same, or the value, and 3*s.* for every pound, to be paid by the owner. *id.* *f.* 13.

And the commissioners of the customs in *Ireland*, shall every six months transmit to the commissioners of the customs in *England*, an account of wool exported, from whence, the quantity and weight, by whom, in what ship, where consigned, names of the persons in *England* signing certificates of landing the same, with the dates of such certificates, and where landed, and the quantity and weight contained in the certificates: Which certificates shall not be obliterated or interlined, and shall be written on paper, and not parchment. 7 & 8 *W. c.* 28. *f.* 6, 7.

And a register shall be kept at the custom-house, *London*, of all the wool imported from *Ireland*, the weight, number, ship, master's name, owner's name, and to whom consigned; for the use of the commissioners. 1 *W. c.* 32. *f.* 11.

Guard ships.

14. The commissioners of the admiralty shall appoint 2 fifth rate ships, 2 sixth rates, and 8 armed sloops, constantly to cruise on the coasts, particularly between the north of *Ireland* and *Scotland*, with orders to seize all ships exporting wool to foreign parts.

And all wool, and vessels so seized, shall be forfeited, and the wool lodged in the king's warehouse till condemned; and then the same after 21 days (together with the vessels so condemned) shall be sold by inch of candle, notice being first given at the custom-house of the port where lodged, and on the *Royal Exchange* at *London*; one fourth of the produce to the commander, one fourth to the officers, one fourth to the mariners, and one fourth to the king (charges of prosecution and condemnation being first paid out of the king's part.) And the commander neglecting his duty herein, shall forfeit his wages, and office, and be imprisoned six months. 10 & 11 *W. c.* 10. *f.* 16, 17, 18.

And they shall also appoint 3 sixth rate ships, and 8 or more armed sloops, to cruise on the *British* and *Irish* coasts, with orders for seizing all ships wherein any woollen manufactures are exported from *Ireland*; which ships and goods shall be forfeited, one fourth to the commander, one fourth

fourth to the officers, one fourth to the mariners, and one fourth to the king, the charges being first paid out of the king's part. But if the seizure was at the information of any person, such informer shall have a fifth part, and the residue be distributed as above. 5 G. 2. c. 21. s. 1. 2, 3.

Wreck.

1. **W**RECK of the sea, in legal understanding, is applied to such goods, as after shipwreck at sea, are by the sea cast upon the land; and therefore the jurisdiction thereof pertaineth not to the lord admiral, but to the common law. 2 Inst 167.

2. None of those goods which are called *jetsam* (from being cast into the sea while the ship is in danger, and after perisheth) or those called *flotsam* (from floating upon the sea after shipwreck) or those called *lagan*, or *ligan* (goods thrown overboard before the shipwreck, which sink to the bottom of the sea) are to be esteemed wreck, so long as they remain upon the sea, and are not cast upon the land by the sea; but if any of them are cast upon the land by the sea, they are wreck. Wood b. c. a.

3. Also by the 3 Ed. 1. c. 4. *Where a man, a dog, or a cat, escape quick out of the ship, the ship or any thing therein shall not be adjudged wreck of the sea.* Living creature escaping.

A man, a dog, or a cat] Which statute being but declaratory of the common law, these three instances are only put for examples; for besides these two kinds of beasts, all other beasts, fowls, and other living things are understood, whereby the property of the goods may be known. 2 Inst. 167, 168.

Escape quick out of the ship] If a ship be ready to perish, and all the men therein (for the safeguard of their lives) leave the ship, and after, the forsaken ship perisheth; if any of the men be saved and come to land, the goods are not lost. 2 Inst. 167.

4. By the 17 Ed. 2. *The king shall have wreck of the sea throughout the realm.* To whom the wreck belongeth.

And the cause wherefore originally wreck was given to the crown, stood upon two main maxims of the common law. 1. That the property of all goods whatsoever must be in some person. 2. That such goods as no subject can claim any property in, do belong to the king by his prerogative. 2 Inst. 167.

5. The taking of goods whereof no one had a property at the time, is not felony; and therefore he who takes away a wreck, before it is seized by the person who has a right thereto, is not guilty of felony, and shall only be punished by fine, or the like. 1 Haw. 93, 94. That is to say, he is not guilty of felony by the common law; but it is otherwise by the statutes here following.

6. To preserve ships stranded, or in distress, from being plundered by the country people, it is enacted by the 4 G. 1. c. 4. as follows:

5 K

If

If any person, besides those impowered by the officer of the customs and the constables, shall enter, or endeavour to enter, on board any such ship in distress, without the leave of the commander, or of the officer of the customs, or constable, or one of them, or in case any person shall molest them in the saving of the ship or goods, or shall endeavour to hinder the saving of such ship or goods, or shall deface the marks of any such goods, before the same shall be taken down in a book by the commander, and the first officer of the customs, such person shall within twenty days make double satisfaction to the party grieved, at the discretion of the two next justices of the peace, or in default thereof, shall by such justices be sent to the next house of correction, where he shall be employed in hard labour twelve months. *f. 3.*

And it shall be lawful for any commander or superior officer of the ship in distress, or for the officer of the customs, or constable on board the ship, to repel by force any such persons as shall without leave or consent as aforesaid, press on board the said ship in distress, and thereby molest them in the preservation of the ship. *f. 4.*

7. In case any goods shall be found upon any person that were stolen or carried off from any such ship in distress, they, on whom such goods shall be found, shall, upon demand, deliver the same to the owner, or to such person by such owner authorized to receive the same, or in default thereof, shall be liable to pay treble the value of such goods, to be recovered by such owner in an action. *f. 5.*

8. By the same statute, the sheriffs, justices of peace of every county, and all mayors, bailiffs, and other head officers of corporations, and port-towns near the sea, and all constables, headboroughs, and officers of the customs, shall, upon application made to them on behalf of any commander of a ship being in danger of being stranded, or being stranded, command the constables of the ports nearest the coasts where such ship shall be in danger, to summon as many men as shall be thought necessary to the assistance of such ship. *f. 1.*

And if there shall be any ship belonging to his majesty, or his subjects, riding near the place, the officers of the customs and constables are required to demand of the superior officers of such ship, assistance by their boats, and such hands as they can conveniently spare; and in case such superior officer of such ship neglect to give such assistance, he shall forfeit 100*l.* to be recovered by the superior officer of the ship in distress, with costs, in any of his majesty's courts of record.

9. The collectors of the customs, and the commanding officer of any ships, and all others who shall act in the preserving of any such ship in distress, or their cargoes, shall within thirty days be paid a reasonable reward by the commander or owners of the ship in distress, or by the merchant whose ship or goods shall be saved; and in default thereof, the ship or goods shall remain in the custody of such officer of the customs, until all charges be paid, and until the said officer of the customs, and the master or other officer of the ship, and all others so employed, shall be reasonably gratified, or security given for that purpose, to the satisfaction of the parties. *f. 2.*

And

And in case after such salvage, the commander, mariners, or owners of such ship so saved, or merchant, whose goods shall be saved, shall disagree with the officer of the customs, touching the monies deserved by any of the persons employed, it shall be lawful for the commander of such ship so saved, or the owner of the goods, or the merchant interested, and also for the officer of the customs, to nominate three of the neighbouring justices of peace, who shall adjust the *quantum* of the gratuities to be paid to the several persons, and such adjustments shall be binding to all parties, and shall be recoverable in an action at law in any of his majesty's courts of record.

And in case no persons shall appear to make his claim to the goods saved, the chief officer of the customs, of the nearest port, shall apply to three of the nearest justices of peace, who shall put him or some other responsible person in possession of the goods, such justices taking an account of the goods, to be signed by such officer of the customs.

And if the goods shall not be claimed within twelve months, public sale shall be made thereof, and if perishable goods forthwith to be sold, and after charges deducted, the residue of the monies, with an account of the whole, shall be transmitted to his majesty's exchequer for the benefit of the owner, who upon affidavit or other proof of his property to the satisfaction of one of the barons, shall, upon his order, receive the same.

10. If any person shall make or be assisting in the making any hole in any part of any ship in distress, or shall steal any pump belonging to any ship, or shall be aiding or abetting in the stealing such pump, or shall wilfully do any thing tending to the immediate loss or destruction of such ship, such persons shall be guilty of felony without benefit of clergy. *f. 6.*

11. If any person shall put forth any false or treacherous lanterns, lights or fires, with intention to subject any ship to danger or shipwreck, such persons being thereof convicted shall be guilty of felony without benefit of clergy. *f. 7.*

12. If any action shall be prosecuted against any persons for any thing they shall do in pursuance of this act, all persons so sued may plead the general issue, &c. and if the plaintiff shall become nonsuit, or forbear prosecution, or discontinue the suit, or if a verdict shall pass against him, or judgment be given against him upon a demurrer, the defendants shall recover full costs. This act shall be a publick act. *f. 8.*

13. If any officer of the customs shall by fraud or wilful neglect abuse the trust hereby reposed in him, and shall be convicted thereof, such officer shall forfeit treble damages to the party grieved, to be recovered in any court of record, and shall be incapable of any employment relating to the customs. *f. 9.*

14. This act shall every year publickly be read in full market, on the market day next preceding *Michaelmas* day, in the public market place of every market town within five miles of the sea, by the mayor or chief magistrate of every such market town, or some other person by him appointed, or where there is no such mayor or chief magistrate, by the clerk of the market, or some other person by him appointed. *f. 10.*

And in default thereof, such mayor, chief magistrate, or clerk of the market, shall forfeit forty shillings for every such offence, to be recovered by civil bill, by the party who shall first sue for the same.

15. This act shall *not* any ways extend to deprive or prejudice his majesty, his heirs or successors, or any claiming under them, or any patentee or grantee of the crown, or any lords of any manors, or other person in relation to any right which they shall have, or lawfully may claim to any wrecks or goods that shall be *flotsam, jetsam, or lagan*. *This act is made perpetual by stat. 11 G. 2. c. 9.*

16. And by the 17 G. 2. c. 11. If the commander, mariners, or owners of the vessel saved (*pursuant to stat. 4 G. 1. c. 4.*) or the owner of the goods, or any person interested therein, or any persons employed in such salvage, or having any interest in such adjustment, shall think themselves aggrieved by such adjustment, *made according to the said act 4 G. 1. c. 4.* it shall be lawful for such persons by petition, setting forth the particular grievances they complain of in such adjustment, to appeal to the lord lieutenant, lord deputy, or chief governors and privy council of *Ireland*, or to the next going justices of assize for the county where such ship or goods shall be saved, after the adjustment made at the election of the person appealing. *f. 1.*

And the lord lieutenant or chief governors and privy council, and such justices of assize, are authorized to receive every such petition of appeal, and to send for and examine upon oath, or being of the people called *quakers*, upon solemn affirmation, such witnesses as shall be thought necessary, and shall determine the matters contained in such petition in a summary way; and such determination of the lord lieutenant, or chief governors and privy council, and of such justices of assize, shall be conclusive to all persons concerned.

17. No petition of appeal to the lord lieutenant, or chief governors and privy council, shall be received, unless such petition of appeal, shall be preferred within three calendar months after such adjustment shall be made, and published by such justices of the peace. *f. 2.*

And such persons so appealing, shall within twenty one days after the the preferring of such petition, serve the officer of the customs with a true copy of such petition, and in default thereof, the said adjustment shall be binding and conclusive to all persons concerned therein.

18. In case such petition shall be preferred to the lord lieutenant, or chief governors and privy council, notice in writing of the day to be appointed for the hearing of such appeal, shall be served on the said officer of the customs, thirty one days at least before the day appointed for such hearing; and the service of such notice shall be deemed to be sufficient notice to all persons employed in such service, or claiming any benefit in such adjustment. *f. 3.*

And in case any such persons concerned in such adjustment shall fail to appear on the day appointed for the hearing of such appeal, it shall be lawful for the lord lieutenant, or chief governors and privy council to proceed therein, and to give the persons so appealing, such relief as if the persons

sons employed in such salvage, and interested in such adjustment, had appeared and made their defence.

And in case the persons appealing shall fail to prosecute such appeal in manner aforesaid, or that such adjustment shall be confirmed upon the hearing of such appeal, it shall be lawful for the lord lieutenant, or chief governors and privy council, to award such costs to the parties employed in such salvage, and interested in the said adjustment, as they shall think fit.

19. Every person intending to appeal to such judges of assize, shall ten days at least before the first day of the assizes, at which such petition is to be preferred, serve the said officer of the customs with a true copy of such petition intended to be preferred at such assizes, and the service of such copy shall be deemed a sufficient notice to all persons employed in such salvage, or claiming any benefit from, or concerned in such adjustment. *§. 4.*

And such petition shall be filed with the clerk of the judges of assize, before the hour of twelve a clock in the forenoon of the second day of the assizes, at which such petition is to be preferred, and such petition shall be finally heard and determined at the same assizes, unless such justices shall see sufficient reason to adjourn the same to the next assizes.

In which case the next going judges of assize shall finally hear and determine the same; and in default of the service of such copy of such petition, or in case of such service, in default of the due prosecution thereof, such adjustment shall be binding and as valid, as if this act had never been made.

20. In case there are not ten days between the making of the said adjustment, by the justices of the peace, and the first day of the then next assizes for the same county, such petition of appeal may be preferred to the next going judges of assize, after the expiration of the said ten days after such adjustment, and such petition shall be as good, and prosecuted in the same manner, as if the same had been preferred to the next going judges of the assize after the adjustment by the said justices of peace. *§. 5.*

21. If the persons employed in such salvage, or claiming any interest, or concerned in such adjustment, shall fail to appear at such assizes, where the said appeal is prosecuted, it shall be lawful for the judges of assize to proceed therein, and to give the persons appealing such relief, as if the persons interested in such adjustment had appeared and made their defence. *§. 6.*

And in case the persons appealing, shall fail to prosecute the said appeal, or that such adjustment shall be confirmed upon the hearing of such appeal, it shall be lawful for such judges of assize to award such costs to the parties interested in the said adjustment, as they shall think proper, not exceeding three pounds.

22. In case any fact shall appear doubtful to such judges of assize upon such appeal, the same shall be tried by a jury to be returned immediately at the prayer of the party, or by the discretion of such judges, and the said judges of assize shall upon the verdict to be found on such trial, make such decree as to them shall seem meet, and the decree of such judges of assize shall be final and conclusive to all parties concerned in the said adjustment and salvage. *§. 7.*

23. In

23. In case such commander, mariners, or owners of the vessel, or the owner of the goods so saved, or any person interested therein, or any persons employed in such salvage, or having any interest in such adjustment, shall think proper to appeal as aforesaid, the said officer of the customs shall, upon such commander, mariners, or owners of the vessel, or the owner of the goods so saved, or any person interested therein, depositing the money allotted by the said justices of the peace, or giving sufficient security by two able persons entering into an obligation payable to such officer of the customs in the penalty of double the sum in such adjustment, with condition in case such appeal shall be brought by such commander, mariner, or owners of the vessel, or the goods so saved, or any person interested therein, to prosecute such appeal, and to pay such sums as shall be decreed upon such appeal, and such costs as shall be awarded thereon as aforesaid, or in default of such prosecution to pay the sums contained in such adjustment, and such costs as shall be awarded as aforesaid, and in case such appeal shall be brought by any of the persons employed in such salvage, or having a demand on account of such salvage, with condition to pay such sums as shall be decreed upon the hearing of such appeal, or in case that such adjustment shall be confirmed, or that such appeal be not prosecuted, such sums as are allotted by said adjustment, deducting thereout such costs as shall be allowed upon the confirmation of such adjustment, or for the non-prosecution of such appeal, deliver up such ship and goods to such persons appealing, in the same manner as if the determination of the said justices of the peace had been fully complied with.

24. If upon an appeal to be preferred by virtue of this act, there shall be any costs awarded to such commander, mariner, or owners of the vessel, or the owner of the goods so saved, or any person interested therein, such costs shall be allowed and deducted out of the adjustment so appealed from. *f.* 8.

25. In case any matter shall, upon the hearing of any appeal, by the lord lieutenant or chief governors and privy council appear doubtful to them, it shall be lawful for them to direct an issue concerning such matters, to be tried in any of his majesty's courts of record at *Dublin*, or before the justices of assize for the county where such vessel or goods have been saved, and upon return thereof, make such decree as to them shall seem meet, which shall be conclusive to all parties. *f.* 9.

CONCLU-

C O N C L U S I O N.

HAVING thus finished the work proposed, it may be requisite, upon the whole, to subjoin one single reflection, which will occur to every reader, in perusing almost every one of the larger titles of this book ; and that is, concerning the possibility and expediency of reforming the statute law. The statutes at large, from the very nature of the thing, have in process of time become very cumbersome, and very intricate. They are not to be purchased but for a larger sum of money, nor to be understood without a greater expence of time, than a wise man would often chuse to employ in that way.

The course to be taken in that matter seems to be this :

First, actually to repeal all those statutes, and parts of statutes, which are *virtually repealed* by subsequent contradictory statutes.

Secondly, to repeal all those statutes which are *obsolete*, and grown out of use, by the alteration of times and circumstances.

Thirdly, to repeal all those statutes, which being neither contradicted by subsequent statutes, nor become obsolete, yet are rendered *useless* by subsequent statutes enacting the same things over again, with alterations and amendments.

Fourthly, to repeal, or alter, all those statutes which are *frivolous*, that is, which possibly cannot, or probably never will be executed : such as those which appoint an offender to be whipped by the hands of the common hangman, where perhaps there is no such officer ; or which prohibit an offence under a very small penalty to be recovered in the courts at *Westminster*, where the reward will not countervail the expence of recovering it.

Fifthly, to omit all those statutes, which although enacted to be public statutes, yet are only of *private concern* ; such as those for bridges in particular places, or paving the streets in such a market town ; and the like.

Sixthly, as to the rest, to lay all the statutes, and clauses of statutes together, which relate to the same subject, and out of the whole to compose one, two, or more uniform and consistent statutes ; and then to repeal all those other, as workmen destroy the scaffolding when they have erected the building.

I know but of one material objection, against this method of proceeding ; and that is, that the law being now for the most part well settled upon the statutes, notwithstanding their acknowledged disorder and confusion, this
would

would tend to unsettle all again, by breaking the connexion which there is between one statute and another, and one part of a statute and another, altering the words and phrases, and after all perhaps not much mending the matter, since it is possible that the new statutes may be as liable to objections as the former were.

But this is an argument not so much against the thing itself, as against the manner in which it may be executed. As to breaking the connexion, it is certain that for the most part there is no connexion; and where there is, that may easily be preserved: And it ought to be laid down as an invariable rule, to retain as much as possible the identical words and sentences of the former statutes; only rejecting what is superfluous, inserting the clear law as it now stands, and putting the same into a form more regular, concise, and easy. And this seemeth no way impossible to be done, by any person of a tolerable understanding, endowed only with a clear head, and much patience.



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